

No. 11982

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United States  
Court of Appeals

for the Ninth Circuit

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E. F. SMITH,

Appellant,

vs.

JIM DANDY MARKETS, INC., FIREMAN'S  
FUND INSURANCE COMPANY, CENTRAL  
MANUFACTURERS' MUTUAL INSURANCE  
COMPANY, and INDIANA LUMBERMEN'S  
MUTUAL INSURANCE COMPANY,

Appellees,

and

CENTRAL MANUFACTURERS' MUTUAL IN-  
SURANCE COMPANY, and INDIANA LUM-  
BERMEN'S MUTUAL INSURANCE COM-  
PANY,

Appellants,

vs.

JIM DANDY MARKETS, INC.,

Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Southern District of California,  
Central Division

SEP 11 1948



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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## Witness for Defendants:

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|               |     |
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Cassidy, Thomas V.

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## NAMES AND ADDRESSES OF ATTORNEYS

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For Appellee Fireman's Fund Insurance Co.:

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607 S. Hill St.,  
Los Angeles 14, Calif. [1\*]

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\*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States, Southern District of California, Central Division.

No. 6838-PH

CENTRAL MANUFACTURERS' MUTUAL  
INSURANCE COMPANY, a Corporation,  
INDIANA LUMBERMENS MUTUAL  
INSURANCE COMPANY, a Corporation,  
Plaintiffs,

vs.

JIM DANDY MARKETS INCORPORATED,  
a Corporation,  
FIREMAN'S FUND INSURANCE COMPANY,  
a Corporation,  
E. F. SMITH,  
Defendants.

## COMPLAINT FOR DECLARATORY RELIEF

### I.

That this court has jurisdiction over the above entitled action by reason of the following facts, the particulars of which are hereafter more fully alleged: a diversity of citizenship exists between plaintiffs and each of the defendants, and the amount involved in this action is in excess of \$3,000.00 exclusive of interest and costs of suit. [2]

### II.

That the plaintiff Central Manufacturers' Mutual Insurance Company is now, and at all the times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the

State of Ohio, and was and is a citizen of the State of Ohio, and is now and was at all times hereinafter mentioned authorized to do business in the State of California and to write policies of fire insurance in said State, and was and is actually engaged in the business of writing said policies in said State of California at all of the times hereinafter mentioned.

### III.

That the plaintiff Indiana Lumbersmens Mutual Insurance Company, is now and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Indiana, and was and is a citizen of the State of Indiana, and is now and was at all times hereinafter mentioned authorized to do business in the State of California and to write policies of fire insurance in said State, and was and is actually engaged in business of writing said policies within said State of California at all of the times hereinafter mentioned.

### IV.

That the defendant Jim Dandy Markets, Incorporated, is now and at all of the times hereinafter mentioned was, a corporation duly organized under the laws of the State of California, and was at all of the times hereafter mentioned a citizen of the State of California, and is now and was at all of the times hereafter mentioned authorized to and was actually engaged in business in the State of California.

## V.

That the defendant Fireman's Fund Insurance Company, is now and at all of the times hereafter mentioned, was a corporation duly organized under the laws of the State of California, and is [3] and was at all of the times hereafter mentioned a citizen of the State of California and is now and was at all of the times hereafter mentioned authorized to do business in the State of California and to write policies of fire insurance in said State, and was and is actually engaged in the business of writing said policies within said State of California at all of the times hereafter mentioned.

## VI.

That the defendant E. F. Smith is now and was at all of the times hereafter mentioned, a resident and citizen of the State of California, residing in the Southern Judicial District of said State.

## VII.

That by reason of the facts hereinbefore alleged there is diversity of citizenship between plaintiffs and each of them and all of the defendants above mentioned.

## VIII.

That the amount in controversy in this action exceeds the sum of \$3,000.00, exclusive of interest and costs.

## IX.

That on, to-wit, July 19, 1946, plaintiff Central Manufacturers' Mutual Insurance Company, issued its Standard California Fire Insurance Policy No. F-321452, whereby, for the period from the 19th

day of July, 1946 at noon, to the 19th day of July, 1949 at noon, it insured Charles Schuster, Leo A. Goldberg, Norman Schuster, Max M. Berick and Earl I. Swetow, doing business as Jim Dandy Markets against all loss or damage by fire except as thereafter provided, to an amount not exceeding \$12,500.00, the premises described as: "One-Story, composition roof, Frame D. Class Building at 6801 Atlantic Boulevard, in the City of Bell, in the County of Los Angeles, in the State of California," including foundations, sidewalks, plumbing, [4] electrical wiring and stationary heating and lighting apparatus and fixtures; also all permanent fixtures, awnings, wall and ceiling decorations and frescoes, stationary scales, machinery and elevators, if belonging to and constituting a part of said building.

#### X.

That thereafter by written endorsement dated October 7, 1946, the name of the insured was changed to read Jim Dandy Markets, a corporation.

#### XI.

That on, to-wit, July 19, 1946, plaintiff Indiana Lumbermens Mutual Insurance Company issued Standard California Fire Insurance Policy No. 3170, whereby for the period from the 19th day of July, 1946 at noon, to the 19th day of July, 1949 at noon, it insured Charles Schuster, Leo A. Goldberg, Norman Schuster, Max M. Berick and Earl I. Swetow, doing business as Jim Dandy Markets, against all loss or damage by fire except as thereafter provided, to an amount not exceeding \$12,-



500.00, the premises described as: "One-Story, composition roof, Frame D Class Building at 6801 Atlantic Boulevard, in the City of Bell, in the County of Los Angeles, in the State of California, including foundations, sidewalks, plumbing, electrical wiring and stationary heating and lighting apparatus and fixtures; also all permanent fixtures, awnings, wall and ceiling decorations and frescoes, stationary scales, machinery and elevators, if belonging to and constituting a part of said building.

## XII.

That thereafter by written endorsement dated July 19, 1946, the name of the insured was changed to read Jim Dandy Markets, a corporation.

## XIII.

That subsequent to said July 19th, 1946, and prior to [5] the date of the fire hereinafter referred to, to-wit: January 14, 1947, the exact time of which is unknown to these plaintiffs, the defendant Fireman's Fund Insurance Company, issued its Standard California Fire Insurance Policy No. A-959495, whereby it insured the defendant E. F. Smith, as the named assured, against loss and damage by fire to the premises hereinbefore described in the amount of \$16,700.00, and that said policy, as plaintiffs are informed and believe, and upon such information and belief allege the fact to be that said policy continued in full force and effect at the time of the loss and damage to said premises from fire on January 14, 1947, as hereafter alleged.

## XIV.

That by the terms and conditions of the said California Standard Fire Insurance Policies issued by each of said plaintiffs, and also by the said policy issued by defendant Fireman's Fund Insurance Company, as the plaintiffs are informed and believe, and upon such information and belief, allege the fact to be it was provided with reference to an apportionment of loss from fire as follows: "This Company shall not be liable under this policy for a greater proportion of any loss on the described property, or for loss by, or expenses of, removal from the premises endangered by fire, than the amount hereby insured bears to the entire insurance covering such property, whether valid or not, or by solvent or insolvent insurers."

## XV.

That the plaintiffs are informed and believe, and upon such information and belief allege the fact to be, that the entire insurance covering the said property hereinbefore described and insured by these plaintiffs, and defendant Fireman's Fund Insurance Company, at the time of the loss sustained by fire as aforesaid, was and is the sum of \$41,700.00 as follows: Central Manufacturers' Mutual Insurance Company, Policy No. F-321452 for \$12,500.00; [6] Indiana Lumbermens Mutual Insurance Company, Policy No. 3170 for \$12,500.00; Fireman's Fund Insurance Company, Policy No. A-94195 for \$16,700.00.

## XVI.

That an actual controversy has arisen between the plaintiffs and defendants as to whether the Jim

Dandy Market, a corporation, has an insurable interest in the property described in the plaintiffs' said policies at the time of the fire, and whether the defendant E. F. Smith, had an insurable interest in said property at the time of the fire.

That a further controversy has arisen as to whether the plaintiffs are liable for the full principal sum of their respective policies, to-wit, \$12,500.00 each, by reason of the agreed loss of \$32,476.92, or whether the liability of said plaintiffs is respectively limited to the proportion of the loss that the amount respectively insured by them bears to the entire insurance covering said property, to-wit, the sum of \$41,700.00.

#### XVII.

That the defendant E. F. Smith is a party interested in and directly affected by the controversies hereinbefore alleged, and that he is joined in this action because of his said interest in said controversies, but that these plaintiffs do not know what, if any, contentions are made by said defendants, or any of them with reference to said controversies.

#### XIX.

That plaintiffs have commenced this action and made the allegations hereinbefore set forth in good faith, and desiring to have their rights and liabilities under said policies of insurance, construed and determined to the end that they may proceed with the payment of the loss under their respective policies, if they are legally liable therefor, and if the defendant Jim Dandy Markets, a corporation, has an insurable interest in said buildings, and [7] in order that the court may determine whether the



Apportionment of Loss Clause in its said policies is applicable in view of the coverage of the policy issued by the Fireman's Fund Insurance Policy, with loss payable to defendant E. F. Smith.

Wherefore, plaintiff prays judgment and for an order and decree herein to the end that the plaintiffs may obtain relief in the premises and declaratory judgment as follows:

1. For a declaration by this court of the respective rights and duties and liabilities of the plaintiffs and defendant, Fireman's Fund Insurance Company, under the respective policies of insurance issued by them and which are in this complaint described.

2. That there be declared by this court who has the insurable interest in the premises described in said policies as between defendant Jim Dandy Markets, a corporation, and defendant E. F. Smith.

3. That it be declared and adjudged by this court whether the insurance under the policy issued by the defendant Fireman's Fund Insurance Company covers the premises described in plaintiffs said complaint, in such a manner that the Apportionment of Loss Clause of plaintiffs' said policies apply and is effective.

4. Plaintiffs pray for such other and further relief as to this Honorable Court shall seem just and equitable, and for all costs of suit herein.

THOMAS P. MENZIES and  
HAROLD L. WATT,

By /s/ THOMAS P. MENZIES,

Attorneys for Plaintiffs.

[Endorsed]: Filed April 22, 1947. [8]

[Title of District Court and Cause.]

ANSWER

Comes now defendant, Fireman's Fund Insurance Company, a corporation, and for Answer to plaintiff's Complaint:

I.

As to the allegations of Paragraph XIII of Plaintiffs' Complaint, defendant admits that prior to the fire of January 14, 1947, referred to in said paragraph, that this defendant had entered into a contract of insurance with E. F. Smith and had issued its Standard California Fire Insurance Policy No. A-959495, whereby it insured defendant E. F. Smith against loss and damage by fire to building located at 6801 Atlantic Boulevard, Bell, California, with certain appurtenances thereto excepted from said insurance for an amount not exceeding \$16,700.00, but denies that said contract was [9] made or entered into subsequent to July 19, 1946, and alleges that said contract of insurance was made and entered into between this defendant and defendant E. F. Smith on July 5, 1945, and denies that said policy continued in full force and effect at the time of the loss and damage to said premises by fire on Jan. 14, 1947, and denies that said policy was in full force and effect at said time, to-wit: on January 14, 1947.

II.

As to the allegations contained in Paragraph XV of plaintiffs' complaint, this defendant states that it is without knowledge or information sufficient to form a belief as to the truth of the averments contained in said Paragraph XV.

III.

As to the allegations contained in Paragraph XVI of plaintiffs' Complaint, this defendant denies said allegations and each and every allegation, matter, and thing therein contained.

Further pleading, this defendant alleges:

I.

That plaintiffs' Complaint fails to state a claim against this defendant upon which the relief prayed for, or any relief, can be granted against this defendant in that it appears upon the face thereof that the only controversy to which this defendant is a party or is interested in is one between this defendant and E. F. Smith, and that a determination of such controversy could not be had in this Court for the reason that the said E. F. Smith and this defendant are each and both citizens and residents of the State of California and no diversity of citizenship or other jurisdictional grounds exist to give this Court jurisdiction to determine said controversy. [10]

Wherefore, this defendant prays that plaintiffs take nothing by their Complaint and that defendant go hence and have and recover its costs and disbursements herein.

/s/ E. EUGENE DAVIS,  
HINDMAN & DAVIS,

By /s/ E. EUGENE DAVIS,  
Attorneys for Defendant, Fireman's Fund Insurance Company.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed May 10, 1944. [11]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT, JIM DANDY  
MARKETS, INC., SUED HEREIN AS  
JIM DANDY MARKETS, INCOR-  
PORATED

Comes now the defendant, Jim Dandy Markets, Inc., erroneously sued herein as Jim Dandy Markets, Incorporated, and answering for itself and not for any other defendant, admits, denies and alleges:

I.

Admits each and every allegation contained in Paragraphs, I, II, III, IV, V, VI, VII, and VIII of the Complaint herein. [13]

II.

Admits each and every allegation contained in Paragraph IX of the Complaint, and alleges that the policy issued by the Central Manufacturers' Mutual Insurance Company, No. F-321452, set forth in Paragraph IX of the Complaint contains, among other things, the following provision "other insurance permitted."

III.

Answering Paragraph X of the Complaint, defendant denies that by written endorsement dated October 7, 1946, the name of the insured in the policy issued by the Central Manufacturers' Mutual Insurance Company, No. F-321452, was changed to read, "Jim Dandy Markets, a corporation", and alleges that, on the 8th day of October, 1946, by written endorsement, this defendant, Jim Dandy

Markets, Inc. was recognized as the insured under said policy No. F-321452 issued by Central Manufacturers' Mutual Insurance Company in the place and stead of Charles Schuster, Leo A. Goldberg, Norman Schuster, Max M. Berick and Earl I. Swetow, doing business as Jim Dandy Markets.

IV.

Answering Paragraph XI of the Complaint, defendant admits each and every allegation contained therein, and alleges that the policy issued by the Indiana Lumbersmens Mutual Insurance Company No. 3170, set forth in Paragraph XI of the Complaint contains, among other things, the following provision "other insurance permitted."

V.

Answering Paragraph XII of the Complaint, defendant denies that by written endorsement dated July 19, 1946, the name of the insured in the policy No. 3170, issued by the Indiana Lumbersmens Mutual Insurance Company was changed to read "Jim [14] Dandy Markets, a Corporation," and alleges that, on the 7th day of October, 1946, by written endorsement, the name of the insured in said policy No. 3170, issued by the Indiana Lumbersmens Mutual Insurance Company was changed to read "Jim Dandy Markets, Inc."

VI.

Answering Paragraph XIII of the Complaint, defendant denies that, subsequent to the 19th day of July, 1946, the defendant, Fireman's Fund Insurance Company issued its standard California fire insurance policy No. A959495 whereby it insured



the defendant, E. F. Smith, as the named insured, against loss and damage by fire to the premises described in the Complaint herein in the amount of \$16,700.00, and denies each and every allegation contained in said Paragraph XIII of the Complaint, and in this connection defendant alleges that, on July 5, 1945, the defendant, Fireman's Fund Insurance Company, issued its standard California fire insurance policy No. A959495, whereby it insured the defendant, E. F. Smith, as the named insured, against loss and damage by fire to the premises described in the Complaint, and situated at 6801 Atlantic Boulevard, Bell, California, in the amount of \$16,700.00, and this defendant alleges that it does not know whether said policy No. A959495, issued by the defendant, Fireman's Fund Insurance Company, was in force and effect at the time of the loss and damage to the premises from fire on January 14, 1947.

## VII.

Answering Paragraph XIV of the Complaint, defendant denies each and every allegation contained in said Paragraph XIV, and in this connection defendant alleges that said Policy No. A959495, issued by Fireman's Fund Insurance Company on July 5, 1945, provided, with reference to the apportionment of loss from fire, as follows: [15]

“Apportionment Clause: This company shall not be liable for a greater proportion of any loss from any peril or perils included in this endorsement than (1) the amount of insurance under this policy bears to the whole amount of fire insurance covering

the property, whether valid or not and whether collectible or not, and whether or not such other fire insurance covers against the additional peril or perils insured hereunder; (2) Nor for a greater proportion than the amount of insurance under this policy bears to the amount of all insurance, whether valid or not and whether collectible or not, covering in any manner such loss; furthermore, if there be insurance other than fire insurance covering any one or more of the perils causing loss hereunder, covering specifically any individual unit of property involved in the loss, only such proportion of the insurance under this policy shall apply to such unit specifically insured, as the value of such unit shall bear to the total value of all the property covered under this policy, whether such other insurance contains a similar clause or not.”

#### VIII.

Answering Paragraph XV of the Complaint, defendant does not have sufficient information or belief with respect to the allegations contained in said Paragraph XV, and because of such lack of information and belief, this defendant denies each and every allegation contained in said Paragraph XV, and in this connection defendant alleges that, at the time of the loss sustained by fire, as alleged in the Complaint and as hereafter alleged, there was fire insurance covering the property so destroyed by fire, as follows:

Central Manufacturers Mutual Insurance Company policy No. F321452, for \$12,500.00, in which this defendant is named as insured. [16]

Indiana Lumbermen's Mutual Insurance Company Policy No. 3170 for \$12,500.00, in which this defendant is named as the insured.

but this defendant does not know whether any policy issued by the defendant, Fireman's Fund Insurance Company, whether bearing No. A959495 or No. A94195, naming the defendant E. F. Smith as insured, was in force and effect at the time of the fire, and this defendant alleges that an actual and bona fide controversy exists and has arisen between all of the parties hereto respecting whether any policy of fire insurance issued by the defendant Fireman's Fund Insurance Company, was in force and effect at the time of the destruction of the insured property on January 14, 1947.

#### IX.

Admits the allegations contained in Paragraph XVI of the Complaint herein.

#### X.

Answering Paragraph XVII of the Complaint, this defendant admits that the defendant E. F. Smith is a party having an interest in, and directly affected by the controversies alleged in the Complaint, and hereinafter alleged, and that he is joined in this action because of his said interest in said controversies, but denies each and every allegation contained in Paragraph XVII of the Complaint and not expressly admitted herein.

#### XI.

Admits the allegations contained in Paragraph XIX of the Complaint herein.



## XII.

This defendant alleges that, on January 14, 1947, the building and property insured and purported to be insured by the fire insurance policies issued by the plaintiffs herein, and by [17] the defendant Fire Insurance Company, was totally destroyed by fire. At the time of the fire the defendant, Jim Dandy Markets, Inc., was the owner of the building so destroyed by fire, and was in sole possession thereof.

## XIII.

That immediately following the destruction of said building by fire, this defendant immediately, and without unnecessary delay, notified each of the plaintiffs of the total destruction of said building by fire; that thereafter the plaintiffs, and each of them, in writing, waived the provisions in each of said policies requiring this defendant to make formal written proof of loss; that on the 9th day of April, 1947, the plaintiffs herein and this defendant agreed, in writing, that the sound cash value of said insured property immediately preceding the loss, and the total loss and damage thereto was and is the sum of \$32,476.92.

## XIV.

This defendant alleges that neither of the plaintiffs, or the defendant Fireman's Fund Insurance Company, have paid any moneys to this defendant on account of said loss.

## XV.

That an actual controversy has arisen between the plaintiffs and the defendants as to whether the

defendant Jim Dandy Markets, Inc. had an insurable interest in the property described in plaintiffs' policies at the time of the fire, and whether the defendant E. F. Smith had an insurable interest in said property at the time of the fire; that an actual controversy has arisen as to whether the plaintiffs are liable for the full principal sum of their respective policies, to-wit: \$12,500.00 each by reason of the agreed loss of \$32,476.92, or whether the liability of said plaintiff is respectively limited to the [18] proportion of the loss that the amount respectively insured by the plaintiff bears to the sum of \$41,700.00; that an actual controversy has arisen as to whether the plaintiffs and the defendant Fireman's Fund Insurance Company are liable and responsible to this defendant for this defendant's loss by reason of the fire in the amount of \$32,476.92, and how much of said sum the plaintiffs and said defendant, Fireman's Fund Insurance Company, should pay towards said sum of \$32,476.92.

Wherefore, this answering defendant prays that this Court make an order and judgment decreeing and determining the respective rights of the parties hereto with respect to the controversies set forth in the Complaint herein, and set forth in this answer; and such other controversies that might exist between the parties hereto with respect to the policies issued by the plaintiffs herein and by the defendant, Fireman's Fund Insurance Company; and that the defendant have judgment for such

other and further relief as to this Honorable Court may seem just and equitable; and for costs of suit herein.

/s/ HARRY G. SADICOFF,  
Attorney for Defendant, Jim Dandy Markets, Inc.  
(Verified.)

[Endorsed]: Filed May 29, 1947. [19]

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[Title of District Court and Cause.]

### ANSWER OF E. F. SMITH

Comes now defendant E. F. Smith for answer to plaintiff's complaint says:

#### I.

As to the allegations of paragraph IX of plaintiff's complaint, defendant E. F. Smith is without knowledge or information and alleges that any insurance placed on the building as therein alleged was without the knowledge of said defendant E. F. Smith and not required by or in accordance with any contract or agreement with said defendant E. F. Smith, the owner of said building. [21]

#### II.

As to the allegations of paragraph XI of plaintiff's complaint, defendant E. F. Smith is without knowledge or information and alleges that any insurance placed on the building as therein alleged was without the knowledge of said defendant E. F. Smith and not required by or in accordance with any contract or agreement with said defendant E. F. Smith, the owner of said building.

## III.

As to the allegations of paragraph XIII of plaintiff's complaint, defendant E. F. Smith denies that defendant Fireman's Fund Insurance Company issued its standard California fire insurance policy No. A-959495 subsequent to July 19, 1946 and alleges that said policy of insurance was issued to defendant E. F. Smith on July 5, 1945.

## IV.

As to the allegations contained in paragraph XV of plaintiff's complaint, defendant E. F. Smith is without knowledge or information as to the policies of fire insurance on said building issued by Central Manufacturer's Mutual Insurance Company or as to the one issued by Indiana Lumbermen's Mutual Insurance Company but alleges that neither of said policies was issued to defendant E. F. Smith or for his benefit and neither constitutes an insurance of the building owned by defendant E. F. Smith in such manner as to cause any proration of the loss sustained by defendant E. F. Smith.

## V.

Defendant E. F. Smith alleges that he was the sole owner of the building located at 6801 Atlantic Boulevard, Bell, California, on July 5, 1945 when the building was insured by Fireman's Fund Insurance Company by its policy No. A-959495 for the sum of \$16,700.00 and continued to be until, and was the sole owner thereof when, the building was totally destroyed by fire on the 14th day of January, 1947 to a total loss in excess of \$32,000.00. Defendant E. F. Smith [22] further alleges that the only



outstanding interest in said building was the right of occupancy under a sublease to defendant Jim Dandy Markets and that said sublease did not transfer to sublessee any of the insurable interest of defendant E. F. Smith as insured in said Fireman's Fund Insurance policy which was in full force and effect at the time of the fire on January 14, 1947.

## VI

On the 29th day of September, 1941 defendant E. F. Smith as lessee entered into a lease with Chas. E. Kindig and Daisy Kindig as lessors, whereby said defendant E. F. Smith leased that real property situated in the City of Bell, County of Los Angeles, State of California and being a part of Lots 4 and 6, Block F of the Grider and Hamilton Subdivision of the east portion of said Bell tract, for a term of five years beginning on the first day of August, 1942, and until the first day of August, 1947. Thereafter and on the first day of February, 1942 said defendant E. F. Smith entered into another lease covering the same property for the same period of time with Thomas A. McLenaghan as administrator of the estate of E. T. Williams, deceased, the owner of a part interest in said property.

## VII.

Defendant E. F. Smith, at the time of the execution of said leases, operated a food market on the property covered thereby which market was housed in a building built and owned by defendant E. F. Smith and it was provided in each of said leases that the improvements then on the premises and

all other improvements placed on the property during the terms of the lease are the property of and belong to defendant E. F. Smith and might be removed by defendant E. F. Smith at the expiration of the said leases. The business conducted on said real property was known as the "Atlantic Store" or the "Atlantic Boulevard Market" and will hereinafter be referred to as such. [23]

### VIII.

On and after September 29, 1941, defendant E. F. Smith as owner of the building and as lessee of the real property was in possession of the Atlantic Store by himself, his agent or sublessee at all times up to and including the 14th day of January, 1947, on which date the leases and each of them were still in force and effect and defendant E. F. Smith, the lessee thereunder and the owner of the building on said property.

### IX.

Defendant E. F. Smith, at the time of entering into said leases, was the operator of several stores in Southern California including said "Atlantic Store." Therefore and on the first day of July, 1945 defendant E. F. Smith as party of the first part entered into an agreement with Charles Schuster, Leo A. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster, a co-partnership doing business under the name and style of Jim Dandy Markets as parties of the second part as to the eight stores, including the Atlantic Store, operated by defendant E. F. Smith, for the sale and purchase of the salable merchandise in each; the

leasing of all store fixtures and equipment; the leasing or subleasing of the stores; and the sale and purchase of specified trucks and trailers. A copy of said agreement is hereunto attached and marked Exhibit "A". Said co-partnership was subsequently incorporated and succeeded by the defendant Jim Dandy Markets Incorporated and will hereafter be referred to as Jim Dandy Markets.

X.

The agreement of July 1, 1945, Exhibit "A", provided that the Atlantic Store was subleased to Jim Dandy Markets and in accordance therewith Jim Dandy Markets entered into possession thereof as sublessee of defendant E. F. Smith and continued to occupy said property as sublessee until and subsequent to the 14th day of January, 1947. [24]

XI.

After the execution of the agreement of July 1, 1945, Exhibit "A", that is on July 5, 1945, defendant E. F. Smith purchased and defendant Fireman's Fund Insurance Company issued its policy of fire insurance No. A-959495 to said E. F. Smith for the total sum of \$166,000.00 on buildings used for retail food markets at various locations, including the building used by the Atlantic Store, on which building the insurance was stated to be \$16,700.00, which policy was at the time of the fire on January 14, 1947, and for all matters pertinent to this suit is still in force and effect.

XII.

On the 12th day of June, 1946, defendant E. F. Smith and defendant Jim Dandy Markets entered

into a supplementary and modified agreement modifying the terms of the agreement of July 1, 1945, Exhibit "A", and providing for the sale of "all of the fixtures, machinery and equipment located and contained in all of the markets referred to in the agreement hereinabove mentioned for a total consideration of \$225,000.00". The supplementary and modified agreement of June 12, 1946 further provided for the deposit in escrow of bills of sale of the fixtures, machinery and equipment located in the various markets; for the deposit in said escrow of the leases on named markets, including the Atlantic Boulevard Market, together with a written assignment of each of said leases; for the holding of said documents in said escrow until the full purchase price of the respective stores had been paid into said escrow after which the bill of sale together with the lease and assignment thereof of the respective markets was to be delivered to said Jim Dandy Markets; for the cancellation as of the 1st day of July, 1946 of the lease on said fixtures, machinery and equipment; for the cancellation and termination of the subleases of the various markets, including the Atlantic Store, as of the date of delivery from escrow of the [25] leases and assignments thereof. Copy of said supplementary and modified agreement of June 12, 1946 is hereunto attached and marked Exhibit "B".

### XIII.

The supplementary and modified agreement of June 12, 1946, Exhibit "B", provided that the bill of sale, as well as the lease and assignment thereof,



of the Atlantic Boulevard Market could be obtained by defendant Jim Dandy Markets on payment of a total of \$27,300.00 into said escrow. Such total sum had not been paid into the escrow on or before January 14, 1947 and the bill of sale of the fixtures, machinery and equipment in said market or the lease and assignment of lease of the real property on which it was situated had not been delivered to Jim Dandy Markets on January 14, 1947 and on that date the sublease as provided in the agreement of July 1, 1945, Exhibit "A", was still in force and effect and the Jim Dandy Markets in possession of said market only as lessee under said sublease.

#### XIV.

At all times on and prior to the 14th day of January, 1947, defendant E. F. Smith was the owner of the building occupied by and in which the Atlantic Store was operated and at no time was the sale of said building considered or negotiated between said E. F. Smith and Jim Dandy Markets or any of the partners or agents thereof and at no time did the value of said building or the transfer of the ownership thereof enter into or become an item in the price fixed and established for the sale of the fixtures, machinery and equipment in said market by defendant E. F. Smith to said Jim Dandy Markets as set out in the supplementary and modified agreement of June 12, 1946 or at any other time and at no time did said Jim Dandy Markets or any one on its behalf acquire any title or interest in and to said building other than that of sub-

lessee for the purpose of occupying the same for the operation of the Atlantic Store. [26]

Wherefore, defendant E. F. Smith prays judgment as follows:

1. For a declaration that defendant E. F. Smith was the owner of the building at 6801 Atlantic Boulevard in the City of Bell, California on January 14, 1947 and at all times prior to its destruction by fire on that day, and

2. For a declaration that the ownership of said building by said defendant E. F. Smith constituted an insurable interest therein which was insured against fire by defendant Fireman's Fund Insurance Company, and

3. For a declaration that any leasehold interest, right of occupancy or expectancy arising from a contract of sale of the Atlantic Market in said city, all as claimed by defendant Jim Dandy Market or any persons for it, did not constitute any ownership or insurable interest in said building which detracted from or reduced the insurable interest of said defendant E. F. Smith and that any policy of fire insurance issued by plaintiffs or either of them to said defendant Jim Dandy Market in nowise detracted from or caused proration of liability due to said E. F. Smith from defendant Fireman's Fund Insurance Company on account of the insurance covering said building as owned by said E. F. Smith, and

4. For such other and further relief as to this

honorable court shall seem just and equitable and for all costs of suit herein.

Dated this 8th day of July, 1947.

/s/ CLYDE THOMAS and  
/s/ MILAN MEDIGOVICH,

Attorneys for Defendant E. F. Smith. [27]

### EXHIBIT "A"

[Plaintiff's Exhibit No. 13 at Trial]

### AGREEMENT

This agreement, made and entered into this 1st day of July, 1945 by and between E. F. Smith, party of the first part, and Charles Schuster, Leo A. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster, a co-partnership, doing business under the name and style of Jim Dandy Markets, parties of the second part:

Witnesseth

Whereas the party of the first part is now engaged in the retail grocery, meat, liquor, delicatessen, fruit and vegetable business and is conducting eight (8) of said retail stores in the State of California, seven (7) of which are in the County of Los Angeles, and one (1) in the County of San Bernardino; and

Whereas of the eight stores so conducted by said party of the first part, four (4) of said stores are owned outright by said party of the first part, and four (4) of said stores are operated by virtue of leases wherein said party of the first part is the lessee; and

## EXHIBIT "A"—(Continued)

Whereas the parties of the second part are desirous of purchasing the entire retail business of the party of the first part, including all salable merchandise and stock in trade, and henceforth said business of the party of the first part may be conducted under the name of E. F. Smith Public Markets, or under their own trade name; and

Whereas the party of the first part is the owner of all store fixtures and other equipment, including office equipment, in all of said eight (8) stores, which the parties of the second part are desirous of leasing from the party of the first part for a period of ten years; and [28]

Whereas the store buildings owned by said party of the first part are generally known as Central Avenue Store, Figueroa Street Store, Norwalk Store and Western Avenue Store, which store buildings parties of the second part are desirous of leasing for a period of ten (10) years from July 1, 1945, and the party of the first part will lease said four (4) store buildings for said period; and

Whereas the other four (4) stores referred to herein as stores leased by the party of the first part and which the parties of the second part are desirous of sub-leasing, are generally known as Watts Store, Atlantic Store, Ontario Store and Sixth Street Store, it being understood that all of said leases do not run for the full period of ten (10) years, but said parties of the second part will sub-lease same from said party of the first part during



## EXHIBIT "A"—(Continued)

the balance of the term set forth in said leases, including the term referred to in the options in said leases; and

Whereas party of the first part has a lease for parking automobiles adjacent to the Figueroa Street store, which will expire May 31, 1947 on which the last month's rent has been paid in advance, and the parties of the second part are desirous of obtaining said parking lot lease by assignment, and the party of the first part will assign same, as hereinafter stated; and

Whereas the party of the first part is the owner of certain licenses required by the State of California, or other political sub-divisions of the State of California, required by party of the first part in conducting a portion of his retail business, and is desirous of transferring said licenses to the parties of the second part and the parties of the second part are desirous of having said licenses transferred upon the terms and conditions hereinafter set forth; and [29]

Whereas the party of the first part is now the owner of seven (7) trucks and four (4) trailers, hereinafter specifically described, which the parties of the second part are desirous of purchasing; and

Whereas the parties of the second part, as additional consideration and as a security for the faithful performance of the terms, conditions and obligations under this agreement and the payment of rent on the leases herein referred to, shall make an advance payment to the party of the first part of



## EXHIBIT "A"—(Continued)

Fifty Thousand Dollars (\$50,000.00) as evidence of good faith that all of the terms, conditions and obligations herein referred to shall be fully and faithfully performed; and

Whereas the parties of the second part are desirous of securing an option for the purchase of all fixtures and equipment in said markets at the expiration of ten (10) years period herein referred to and the party of the first part is desirous of granting or giving said option to the parties of the second part; and

Whereas upon the completion of this agreement, the party of the first part is desirous of selling the good will of the market business to the parties of the second part, and the parties of the second part are desirous of acquiring the same;

Now, therefore, it is mutually agreed as follows:

1. That the party of the first part agrees to sell, and the parties of the second part agree to purchase, all salable merchandise now owned by party of the first part in all of said eight (8) stores hereinbefore referred to, and to pay cash for same in escrow; said escrow to be opened immediately upon the execution of this agreement with Naas-Baruch Company, and the inventory of said merchandise shall be taken under the [30] supervision of the parties hereto by the employees of first and second parties, or by some other person or persons to be agreed upon by the parties hereto. Said parties of the second part shall pay into escrow the full purchase price of said inventory, and said price shall

## EXHIBIT "A"—(Continued)

be fixed at market or cost price, whichever is the lowest. Upon completion of said inventory and the payment of the inventory price thereof, said parties of the second part shall henceforth conduct the business of the party of the first part, either under the name of E. F. Smith Public Markets, or under the trade name of the parties of the second part, which permission to conduct said business under the name of E. F. Smith Public Markets is hereby given for the period of ten (10) years from the 1st day of July, 1945.

2. The party of the first part shall under the rules of the Office of Price Administration transfer to the parties of the second part all ration points in his possession or to his credit in the ration bank, said ration points so transferred, together with rationed merchandise inventory, shall be subject to the approval of the Office of Price Administration.

3. That the party of the first part does hereby lease to the parties of the second part all store fixtures and equipment, including office fixtures, now owned by the party of the first part and used in the conduct of his business, for a period of ten (10) years for a monthly rental of One Thousand Four Hundred Dollars (\$1400.00). An inventory of said fixtures and equipment shall be furnished by the party of the first part to the parties of the second part, showing the fixtures and equipment in each of the said stores above referred to, and said inventory shall be considered a part of this agreement. The title to all of said fixtures and equip-

## EXHIBIT "A"—(Continued)

ment shall remain in the party of the first part during the entire term, but the parties of the second part [31] shall have the right and privilege, which right and privilege is hereby granted, to exchange or remove any of said equipment or fixtures by replacing same with other equipment or fixtures of at least equal market value—all of said replacements to become the property of the party of the first part.

4. The party of the first part does hereby agree with the parties of the second part to enter into a ten-year lease from July 1, 1945 for all store buildings owned outright by party of the first part, and the parties of the second part agree to lease said store buildings for the period of ten (10) years, at the following rentals:

Central Avenue Store.....\$550.00 per month

Figueroa Street Store..... 400.00 per month

Norwalk Store..... 200.00 per month

Western Avenue Store..... 650.00 per month

This said monthly rental does not include the rental of store fixtures and equipment hereinbefore set forth, but is subject to certain concessions or leases, as follows:

Central Avenue Store is subject to a written lease or concession for the sale of fruit and vegetables, at a rental of \$100.00 per month, which lease shall expire March 1, 1946, and which shall be assigned to the parties of the second part;

Figueroa Street Store is subject to a month to month lease for the sale of fruit and vegetables at

## EXHIBIT "A"—(Continued)

the rental of \$100.00 per month, together with a written lease for the sale of merchandise usually found in drug stores at the rental of \$150.00 per month, which expires on December 2, 1948, and which shall be assigned to the parties of the second part;

Norwalk Store is subject to a month to month lease [32] for the sale of fruit and vegetables at the rental of \$130.00 per month;

Western Avenue Store is subject to a written lease for the sale of fruit and vegetables at the rental of \$300.00 per month, which expires March 1, 1946 and which shall be assigned to the parties of the second part.

Said fruit and vegetable leases include janitor, water, light and refrigeration services.

5. The party of the first part hereby agrees to sublease the stores now leased by party of the first part, known as the Watts, Atlantic, Ontario and Sixth Street Stores, to the parties of the second part, and the parties of the second part agree with the party of the first part to rent all of said stores for the full term of ten (10) years, provided, however, that on the expiration of the lease now upon said premises, the party of the first part will be able to re-lease said stores at a rental equal to or lower than that paid by the parties of the second part at the expiration of said leases, the parties of the second part must accept same; but in the event that the party of the first part is unable to re-lease said stores at the rent then paid by parties



## EXHIBIT "A"—(Continued)

of the second part, party of the first part shall not release said stores at a higher rent unless same is satisfactory to parties of the second part, and parties of the second part will in that event pay the increased rent agreed upon on the first day of each and every month during the term of said leases or any extensions thereof, not to exceed ten (10) years.

The stores to be sub-leased to the parties of the second part are subject to the following sub-leases on concessions in said stores, which shall be assigned to the parties of the [33] second part;

Watts Store is subject to a written fruit and vegetable lease, which expires March 1, 1946, payable at the rate of \$300.00 per month;

Atlantic Store is subject to a written fruit and vegetable lease which expires March 1, 1946, payable at the rate of \$300.00 per month;

Ontario Store is subject to a month to month fruit and vegetable lease at \$300.00 per month;

Sixth Street Store is subject to a written fruit and vegetable lease which expires March 1, 1946 payable at the rate of \$300.00 per month; also subject to a written lease to Van de Kamp's Holland Dutch Bakeries, Inc., which expires May 31, 1948, payable at the rate of \$100.00 per month.

All fruit and vegetable sub-leases include janitor, water, light and refrigeration services.

6. It is understood by and between the parties hereto that the leases now held by the party of the first part have an expiration date prior to June 30, 1955 and that the party of the first part will do



## EXHIBIT "A"—(Continued)

everything within his power to secure an additional lease to and including June 30, 1955 in the manner set forth in Paragraph 5. Said party of the first part must sub-lease to the parties of the second part all additional leases or extensions of the present leases covering the above stores at the exact rental that he is obligated to pay for said additional leases or extensions of leases on the above stores, and in the event said leases, or any of them, cannot be secured under terms satisfactory to the parties of the second part, the monthly rental on each [34] store shall be reduced proportionately together with the monthly rental to be paid by parties of the second part on the fixtures and equipment as follows:

In the event that the Watts store cannot be re-leased, the total rent on said sub-leases shall be reduced by \$500.00 per month, and the total rent on the fixtures and equipment shall be reduced \$200.00 per month;

In the event the Atlantic Avenue store cannot be re-leased, the total rent on said sub-leases shall be reduced \$320.00 per month on the property and \$200.00 per month on the fixtures and equipment;

In the event the Ontario store cannot be re-leased, the total rent from the sub-leases shall be reduced by \$205.00 per month and the rent on the fixtures and equipment shall be reduced \$200.00 per month;

In the event the Sixth Street store cannot be re-leased the total rent on the sub-lease shall be re-

## EXHIBIT "A"—(Continued)

duced \$800.00 per month and the rent on the fixtures and equipment \$150.00 per month.

7. In the event any of the leases cannot be extended or new leases secured, the party of the first part may sell all of the fixtures in any of said stores not re-leased, and the option price hereinafter referred to shall be reduced in proportion, said reduction to be mutually agreed upon.

8. It is understood between the parties hereto that in the event any or all of the leases herein referred to cannot be renewed or new leases secured by the party of the first part, the parties of the second part shall not renew or lease any of them in their own name or otherwise, during the term of this lease.

9. It is further understood by and between the parties hereto that there is a parking lot lease adjacent to the Figueroa [35] Street store, which will expire May 31, 1947 on which the last month's rent has been paid in advance, and which the party of the first part will assign to the parties of the second part, and the parties of the second part will accept said assignment and pay to the party of the first part the last month's rent advanced on said parking lot lease. All other parking lot agreements or leases are on a month to month basis.

10. The party of the first part hereby agrees with the parties of the second part that the party of the first part shall assign all licenses now in his name issued by the State of California or any political sub-division thereof, that can be assigned to

EXHIBIT "A"—(Continued)

the parties of the second part, and the parties of the second part shall pay the pro-rata share of unused portions of said licenses.

11. The party of the first part hereby agrees to sell and transfer to the parties of the second part, the seven (7) trucks and four (4) trailers, and the parties of the second part agree to accept such sale and transfer and to pay for the same the sum of Seven Thousand Five Hundred dollars (\$7500.00) cash upon the execution of said transfer. Said trucks and trailers are more particularly described as follows:

Ford 8, Body Type Van—Engine No. 18-4889392.

Dodge 6, Body Type, Exp—Engine No. T-120-2685.

Ford 8, Body Type, Tract—Engine No. 99T-52661.

Dodge 6, Type Tract—Engine No. 7-4342.

Dodge 6, Body Type Stake Truck—Engine No. T100-1004.

Dodge 6, Body Type 0942 Van—Engine No. T120-1052.

Dodge 6, Body Type Tractor—Engine No. T120-6897.

Trailer—Make Utl. Semi, Body Type Stake, Factory No. 10147.

Trailer—Utl. Semi. Body Type Stake—Factory No. 9174.

Trailer Utl. Body Type Stake, Factory No. 8463.

Trailmobile, Body Type Stake Tir—Factory No. Cal. 292.

## EXHIBIT "A"—(Continued)

12. The parties of the second part shall deposit as advance payment on the obligations herein incurred by the parties of the second part and as security for the faithful performance [36] of the obligations herein set forth to be performed by the parties of the second part, the sum of Fifty Thousand Dollars (\$50,000.00); said sum of \$50,000.00 shall be applied by the party of the first part upon the rental obligations of the leases herein referred to, due under this agreement during the last year thereof, provided, the parties of the second part faithfully carry out all of the terms and conditions therein set forth, together with the payment of all rents that may become due under and by virtue of any lease. The party of the first part shall pay to the parties of the second part six percent (6%) interest on said \$50,000.00, said interest to be paid annually.

13. The party of the first part does hereby give and grant to the parties of the second part an option to purchase all fixtures and equipment in all of said stores herein described at the price of One Hundred Ninety-two thousand five hundred dollars (\$192,500.00) cash; said option cannot be exercised until the expiration of said ten years, and if the parties of the second part desire to exercise said option at said time, a notice in writing to the party of the first part must be given at least ninety (90) days prior to the expiration of the said term of ten years, and the money to be paid on said option must be deposited in escrow to the credit of the



EXHIBIT "A"—(Continued)

party of the first part within 30 days after the issuance of said notice.

14. The parties of the second part shall not assign any of the leases or sub-leases herein referred to during the term of this agreement without the written consent of the party of the first part.

15. The party of the first part does hereby agree to furnish to the parties of the second part any records that he may have in reference to the purchase of merchandise or other records that may assist the parties of the second part in the conduct of the business herein sold, and in consideration of the execution [37] of this agreement by the parties of the second part and in consideration of the purchase by parties of the second part of the good will of the business operated by the party of the first part, and so long as the said parties of the second part fully and faithfully comply with all of the terms, provisions and conditions of this agreement, the party of the first part agrees that he will not engage in the retail market business, or any similar business as the one herein sold to the parties of the second part, within the County of Los Angeles or in the City of Ontario, California, as long as the parties of the second part or any person or persons deriving title to the good will of said business from said parties of the second part carries on a like business therein during the term of this contract.

16. The party of the first part is to pay all taxes levied or assessed against all fixtures in said stores



## EXHIBIT "A"—(Continued)

and to keep same insured at his own cost and expense during the term of this agreement.

In witness whereof, the parties hereto have subscribed their names the day and year in this agreement first above written.

E. F. SMITH,

Party of the first part.

CHARLES SCHUSTER,

LEO A. GOLDBERG,

EARL I. SWETOW,

MAX M. BERICK,

NORMAN SCHUSTER,

Doing business under the name and style of Jim  
Dandy Markets, Parties of the Second part. [38]

(Note: Exhibit "B" to this document being  
"Supplementary and Modified Agreement" is the  
same as Plaintiff's Exhibit 7 at the trial appearing  
at page 65 of this printed Record.)

[Endorsed]: Filed July 9, 1947. [39]

[Title of District Court and Cause.]

CROSS-CLAIM OF DEFENDANT E. F. SMITH  
AGAINST DEFENDANT JIM DANDY  
MARKETS, INCORPORATED

For a separate cross-claim against defendant Jim Dandy Markets, Incorporated defendant E. F. Smith alleges:

I.

Cross-Claimant E. F. Smith hereby refers to the allegations contained in Paragraph V to XIV, inclusive, of his answer and hereby incorporates the same by reference and makes the same a part hereof for all purposes.

II.

Pursuant to the "supplementary and modified agreement," Exhibit "B", of the answer of Cross-Claimant E. F. Smith, an [40] assignment of the leases held by him on the real property on which the Atlantic store was situated was prepared, signed and deposited in escrow pursuant to said agreement. Copy of said assignment is hereunto attached marked Exhibit "C", hereby referred to and made a part hereof. Said assignment was executed only for the purpose of fulfilling the terms of the "supplementary and modified agreement" Exhibit "B" and not as a result of any further, additional or different consideration, negotiation or contract or pursuant to any agreement other than that contained in said "supplementary and modified agreement" Exhibit "B".

## III.

The building occupied by said Atlantic Markets belonged to defendant and Cross-Claimant E. F. Smith as alleged in Paragraph VII of his answer and was not sold or otherwise conveyed or agreed to be conveyed to Jim Dandy Markets, or its predecessors in interest and no consideration was paid therefor under the terms of said "supplementary and modified agreement", Exhibit "B", or otherwise, or at all.

## IV.

During the preparation for trial of the above entitled case and pre-trial negotiations in an effort to arrive at a stipulation of facts, it developed that Jim Dandy Markets claim that by virtue of said assignment Exhibit "C" the building occupied by said Atlantic Markets was conveyed to and is the property of said Jim Dandy Markets. At no time during the negotiations or discussions between defendant E. F. Smith and the defendant Jim Dandy Markets, its predecessors in interest or their brokers or agents, was the said building considered or discussed as a subject of the proposed sale by said E. F. Smith to Jim Dandy Markets, and its value was in no wise considered as an element of the sale price agreed upon and no part of said price was in payment of the value of said building. If said assignment Exhibit "C" is construed as conveying said building [41] it is contrary to the agreement of the parties as consummated in the "supplementary and modified agreement" Exhibit "B" and contrary to the understanding of all the parties

thereto. The assignment, Exhibit "C" was signed by defendant E. F. Smith under the belief that he was executing it only in fulfillment of the agreement Exhibit "B" and if said assignment Exhibit "C" is construed as conveying said building to said Jim Dandy Markets it does not correctly contain the agreement of the parties thereto; and Cross-Claimant E. F. Smith alleges that if said defendant Jim Dandy Markets and its predecessors did not share the belief of defendant E. F. Smith that said assignment did not convey said building, then said Jim Dandy Markets and its predecessors knew of the belief of defendant E. F. Smith in that regard and that he would not have signed said assignment as reduced to writing if he had known it did convey said building contrary to said agreement and understanding that the parties had entered into; if defendant Jim Dandy Markets and its predecessors did not share defendant E. F. Smith's belief that the assignment was only in accordance with said agreement Exhibit "B" then the conduct of the Jim Dandy Markets and its predecessors in failing to advise said defendant E. F. Smith that said assignment would convey said building was wrongful and fraudulent.

Wherefore, Defendant E. F. Smith prays judgment that said assignment Exhibit "C" be reformed to express the true intent of the parties as stated aforesaid, that is, as assigning the ground lease only and reserving the building thereon in the de-

fendant E. F. Smith; for cost of suit; and for such other and further relief as to the court may seem proper.

/s/ CLYDE THOMAS,  
/s/ MILAN MEDIGOVICH,  
Attorneys for Defendant  
E. F. Smith. [42]

(Note: Exhibit "C" to this document entitled "Assignment of Lease" is omitted as it is the same as plaintiff's Exhibit No. 10 appearing at page 86 of this printed Record.)

[Endorsed]: Filed Oct. 24, 1947. [43]

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[Title of District Court and Cause.]

ANSWER OF DEFENDANT, JIM DANDY  
MARKETS, INC. TO CROSS CLAIM OF  
DEFENDANT E. F. SMITH

Comes now the defendant, Jim Dandy Markets, Inc., and answering the cross-claim of the defendant, E. F. Smith, herein, admits, denies and alleges:

I.

With reference to Paragraph V of the Answer of the defendant E. F. Smith, and incorporated by reference in the cross-claim of the defendant E. F. Smith, admits that the building upon the property at 6801 Atlantic Boulevard, Bell, California, at the time it was totally destroyed by fire on the 14th day of January, 1947, was reasonably worth in excess of \$32,000.00, but [44] denies each and every other matter, allegation and thing contained in said



paragraph, and not expressly admitted herein, and this defendant alleges that at the time said building was destroyed by fire, this defendant was the sole and unconditional owner of said building.

## II.

With reference to Paragraph VI of the Answer of the defendant E. F. Smith, and incorporated by reference in the cross-claim of the defendant E. F. Smith, admits the allegations contained in said Paragraph VI; that a photostatic copy of the Lease dated the 29th day of September, 1941, between the defendant E. F. Smith, as Lessee, and Charles E. Kindig and Daisy Kindig as Lessors, is attached hereto and made a part hereof, and is marked Exhibit "A"; that a photostatic copy of the Lease dated the 1st day of February, 1942, between the defendant E. F. Smith and Thomas A. McLenaghan as Administrator of the Estate of E. T. Williams, deceased, is attached hereto marked Exhibit "B".

## III.

With reference to Paragraph VII of the Answer of the defendant E. F. Smith, and incorporated by reference in the cross-claim of the defendant E. F. Smith, this defendant admits each and all of the allegations contained in said Paragraph VII.

## IV.

With reference to Paragraph VIII of the Answer of the defendant E. F. Smith, and incorporated by reference in the cross-claim of the defendant E. F. Smith, this defendant admits that said Leases (Exhibits "A" and "B") were in force and effect on

the 14th day of January, 1947, but denies each and every other allegation, matter and thing contained in said Paragraph VIII and not expressly admitted herein. [45]

#### V.

With reference to Paragraph IX of the Answer of the Defendant E. F. Smith, and incorporated by reference in the cross-claim of the defendant E. F. Smith, this defendant denies that, subsequent to the 1st day of July, 1945, or at any time, the partnership known as Jim Dandy Markets, and consisting of Charles Schuster, Leo A. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster, was incorporated under the name of Jim Dandy Markets, Inc. or Jim Dandy Markets, Incorporated, but admits each and all of the allegations contained in said Paragraph IX and not denied herein, and alleges that, subsequent to the 1st day of July, 1945, and prior to the 14th day of January, 1947, the defendant Jim Dandy Markets, Inc., a California Corporation, was organized and incorporated.

#### VI.

With reference to Paragraph X of the Answer of the Defendant E. F. Smith, and incorporated by reference in the cross-claim of the defendant E. F. Smith, this defendant admits that, on or about the 1st day of July, 1945, Jim Dandy Markets, a partnership, entered into possession of said "Atlantic Store" as the Sub-Lessee of the defendant E. F. Smith, but denies each and every other matter, allegation and thing contained in said Paragraph X, and alleges that, at the time the building was totally

destroyed by fire on the 14th day of January, 1947, the defendant Jim Dandy Markets, Inc. was in possession of said "Atlantic Store" and the building thereon, and that the said defendant Jim Dandy Markets, Inc. was in possession of said building as the sole and unconditional owner thereof.

## VII.

With reference to the allegations contained in Paragraph XI of the Answer of the defendant E. F. Smith, and [46] incorporated by reference in the cross-claim of the defendant E. F. Smith, this defendant has not sufficient information or belief with reference to the allegations contained in said Paragraph XI, and therefore denies each and every matter, allegation and thing contained in said Paragraph XI.

## VIII.

With reference to Paragraph XII of the Answer of the defendant E. F. Smith, and incorporated by reference in the cross-claim of the defendant E. F. Smith, this defendant admits that on the 12th day of June, 1946, the defendant E. F. Smith and the partnership known as Jim Dandy Markets, entered into a "Supplementary and Modified Agreement"; that a photostatic copy of said "Supplementary and Modified Agreement" is attached hereto and made a part hereof, and is marked Exhibit "C"; that subsequent to the 12th day of June, 1946, and prior to the time that the building was totally destroyed by fire on January 14, 1947, all rights with respect to said "Atlantic Store" were transferred, sold and assigned to the defendant Jim Dandy Markets, Inc.

This defendant denies each and all of the allegations contained in said Paragraph XII and not expressly admitted herein.

This defendant further alleges that, concurrently with the execution and delivery of said "Supplementary and Modified Agreement", and in accordance with the terms, covenants and conditions of said Agreement, an escrow was commenced with the Morrison Escrow Company, and Escrow Instructions and Modified Escrow Instructions were given to said Morrison Escrow Company; that a photostatic copy of said Escrow Instructions and said Modified Escrow Instructions is attached hereto and made a part hereof, and is marked Exhibit "D"; that at the time said Escrow Instructions and Modified Escrow Instructions (Exhibit "D") were delivered to the said Morrison Escrow Company, the defendant [47] E. F. Smith delivered to said Morrison Escrow Company, each and all of the documents required by him to be delivered under the terms, covenants and conditions of said "Supplementary and Modified Agreement" (Exhibit "C"), and of said Escrow Instructions and Modified Escrow Instructions (Exhibit "D"), including, but not limiting, the following documents, which documents all refer and relate to the said "Atlantic Store":

(a) Lease dated September 29, 1941, between E. F. Smith as Lessee, and Charles E. Kindig and Daisy Kindig as Lessors (Exhibit "A"):

(b) Lease dated February 1, 1942, between E. F. Smith as Lessee, and Thomas A. McLenaghan as



Administrator of the Estate of E. T. Williams, deceased. (Exhibit "B").

(c) Bill of Sale dated June 27, 1946, executed by E. F. Smith in favor of Jim Dandy Markets, a partnership; that a photostatic copy of said Bill of Sale is attached hereto and made a part hereof, and marked Exhibit "E".

(d) Assignment of Lease dated June 27, 1946, executed by defendant E. F. Smith in favor of Charles Schuster, Leo A. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster; that a photostatic copy of said Assignment of Lease is attached hereto and made a part hereof, and marked Exhibit "F". [48]

## IX.

With reference to Paragraph XIII of the Answer of the defendant E. F. Smith, and incorporated by reference in the cross-claim of the defendant E. F. Smith, this defendant denies that on January 14, 1947 (that date being the day upon which the building was destroyed by fire) the Agreement dated the 1st day of July, 1945 (and denominated in said paragraph as a "Sub-Lease" and called Exhibit A and affixed to the Answer of the defendant E. F. Smith) was in full force and effect, and denies that the defendant Jim Dandy Markets, Inc. was in possession of said "Atlantic Store" as a Lessee under said Agreement dated July 1, 1945, and admits each and every allegation, matter and thing contained in said Paragraph XIII and not expressly denied herein, and in this connection this defendant alleges that, prior to January 14, 1947, and subsequent to



the 12th day of June, 1946 (the date upon which the Supplementary and Modified Agreement was entered into), this defendant, Jim Dandy Markets, Inc., by mesne conveyance, succeeded to all rights that the partnership known as Jim Dandy Markets had under the following documents, as they relate to said "Atlantic Store":

(a) Lease dated September 29, 1941, between the defendant E. F. Smith, as Lessee, and Charles E. Kindig and Daisy Kindig as Lessors, (Exhibit "A").

(b) Lease dated February 1, 1942, between E. F. Smith as Lessee, and Thomas A. McLenaghan as Administrator of the Estate of E. T. Williams, Deceased. (Exhibit "B")

(c) Supplementary and Modified Agreement dated June 12, 1946. (Exhibit "C") [49]

(d) Escrow Instructions and Modified Escrow Instructions. (Exhibit "D")

(e) Bill of Sale dated June 27, 1946. (Exhibit "E")

(f) Assignment of Lease dated June 27, 1946. (Exhibit "F").

And in this connection this defendant further alleges that, on the 5th day of October, 1946, the co-partnership theretofore existing between Charles Schuster, Leo A. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster, and doing business under the fictitious firm name and style of Jim Dandy Markets, was dissolved, and said "Atlantic Store", including all merchandise, fixtures and rights of said partnership under the "Supplemen-

tary and Modified Agreement" (Exhibit "C"), and rights under the "Escrow Instructions and Modified Escrow Instructions" (Exhibit "D"), and "Bill of Sale" (Exhibit "E") and "Assignment of Lease" (Exhibit "F") above set forth, as well as other stores, were, by said partnership and its partners, transferred to Charles Schuster and Norman Schuster, and said Charles Schuster and Norman Schuster, on the said 5th day of October, 1946, transferred all of said rights so acquired by them from the partnership, to the defendant Jim Dandy Markets, Inc., and Jim Dandy Markets, Inc., at all times from and after the said 5th day of October, 1946, was in possession of the said "Atlantic Store", including the building thereon, to and including January 14, 1947, at which time the building known as the "Atlantic Store" was totally destroyed by fire, and this defendant alleges that all payments required to be made under the provisions of the "Supplementary and Modified Agreement" (Exhibit "C"), and under the "Escrow Instructions and Modified Escrow Instructions" (Exhibit "D"), up to and including the date the building was destroyed by fire, were made by either the partnership known as Jim Dandy Markets, or [50] the defendant Jim Dandy Markets, Inc., and the full amounts due under said "Supplementary and modified Agreement" (Exhibit "C"), and said "Escrow Instructions and Modified Escrow Instructions" (Exhibit "D") on the "Atlantic Store" were fully and completely paid to the defendant E. F. Smith by the defendant Jim Dandy Markets, Inc. on or

about the 19th day of March, 1947, and all amounts due under said "Supplementary and Modified Agreement" (Exhibit "C"), and said "Escrow Instructions and Modified Escrow Instructions" (Exhibit "D") have been paid and were received by the defendant E. F. Smith subsequent to the 14th day of January, 1947, and no amount is due, owing and unpaid to the defendant E. F. Smith under said "Supplementary and Modified Agreement" (Exhibit "C"), and said "Escrow Instructions and Modified Escrow Instructions" (Exhibit "D"); that at the time of the destruction of the building by fire on January 14, 1947, neither the partnership known as Jim Dandy Markets, nor the defendant Jim Dandy Markets, Inc. were in default in the payment of any amounts due and payable under the "Supplementary and Modified Agreement" (Exhibit "C"), and said "Escrow Instructions and Modified Escrow Instructions" (Exhibit "D").

This defendant further alleges with reference to the allegations contained in Paragraph XIII of the Answer of the defendant E. F. Smith, and incorporated by reference in the cross-claim of the defendant E. F. Smith, that the building which was destroyed by fire, and known as the "Atlantic Store" was built partially upon the land described in the Lease marked Exhibit "A" and partially upon the land described in the Lease marked Exhibit "B"; that at no time from the 1st day of July, 1945 to the date that the building known as the "Atlantic Store" was destroyed by fire, or at any time subsequent thereto, did the defendant E. F.

Smith ask, demand or receive any rents for the use or occupancy of said building, or the land upon which said building was situated, and [51] all rents and taxes, including the taxes upon the building, which were due and payable as provided in the Leases marked Exhibit "A" and Exhibit "B" were paid by Jim Dandy Markets, partnership, or Jim Dandy Markets, Inc., to the respective Lessors named in said Leases; that within a few days after payment was received by the defendant E. F. Smith of all amounts due him for the "Atlantic Store" under the provisions of the "Supplementary and Modified Agreement" (Exhibit "C") and said "Escrow Instructions and Modified Escrow Instructions" (Exhibit "D"), the said Morrison Escrow Company delivered to the defendant Jim Dandy Markets, Inc., the following documents.

(1) Lease marked Exhibit "A".

(2) Lease marked Exhibit "B".

(3) Bill of Sale marked Exhibit "E".

(4) Assignment of Lease marked Exhibit "F".

and delivered to the defendant Jim Dandy Markets, Inc., all documents required by said "Supplementary and Modified Agreement" (Exhibit "C") and said "Escrow Instructions and Modified Escrow Instructions" (Exhibit "D") to be delivered by said Morrison Escrow Company to Jim Dandy Markets, or its successors or assigns, upon the payment in full to the defendant E. F. Smith of the sum of \$27,300.00 for said "Atlantic Store".

This defendant further alleges that on the 30th day of July, 1947, the full sum of \$225,000.00 re-



quired to be paid to the defendant E. F. Smith under the "Supplementary and Modified Agreement" (Exhibit "C"), and the "Escrow Instructions and Modified Escrow Instructions" (Exhibit "D"), was paid to the defendant E. F. Smith, and the Morrison Escrow Company delivered to the defendant Jim Dandy Markets, Inc., all papers and documents required of said Morrison Escrow Company under said "Supplementary and Modified Agreement" (Exhibit "C"), and the "Escrow Instructions and Modified Escrow Instructions" (Exhibit "D"), to be delivered. [52]

#### X.

Answering Paragraph II of the Cross-claim of the defendant E. F. Smith, this defendant admits that the defendant E. F. Smith, pursuant to the "Supplementary and Modified Agreement" (Exhibit "C") deposited with the Morrison Escrow Company the "Assignment of Lease" marked Exhibit "C" in the cross-claim of said defendant E. F. Smith, and marked Exhibit "F" herein, but denies each and every matter, allegation and thing contained in said Paragraph II and not expressly admitted herein.

#### XI.

This defendant denies each and every matter, allegation and thing contained in Paragraph III of the cross-claim of the defendant E. F. Smith herein.

#### XII.

This defendant denies each and every matter, allegation and thing contained in Paragraph IV of the cross-claim of the defendant E. F. Smith herein.



For a Further and Separate Defense to Said Cross-Claim This Defendant Alleges:

I.

That the defendant E. F. Smith is a resident of the County of Los Angeles, State of California; that the defendant Jim Dandy Markets, Inc., is a corporation organized and existing under and by virtue of the laws of the State of California; that its principal place of business is in the County of Los Angeles; that the defendant Fireman's Fund Insurance Company is a corporation organized and existing under and by virtue of the laws of the State of California; that its principal place of business is in the City and County of San Francisco.

II.

That said cross-claim fails to state a claim against [53] this defendant upon which the relief prayed for can be granted, in that it appears from the cross-claim of the defendant E. F. Smith that neither the plaintiffs herein, nor Fireman's Fund Insurance Company are parties to, or interested in the alleged cause of action of the defendant E. F. Smith on his alleged cross-claim, and that a determination of the controversy alleged in said cross-claim between this defendant and the said defendant E. F. Smith cannot be had in this Court for the reason that the said E. F. Smith and this defendant are each citizens and residents of the State of California, and no diversity of citizenship, or other jurisdictional grounds exist to give this Court jurisdiction to determine the controversy alleged in said cross-claim.

Wherefore, this defendant prays that the defendant E. F. Smith take nothing by his cross-claim herein; that the same be dismissed; and that this defendant have judgment for costs and for such other and further relief as is just and proper.

/s/ HARRY G. SADICOFF,  
Attorney for Defendant, Jim Dandy  
Markets, Inc. [54]

EXHIBIT "A"  
[Plaintiff's Exhibit No. 5 at Trial]

LEASE

This Indenture, made this 29th day of September, 1941, between Chas. E. Kindig and Daisy Kindig, husband and wife, of Moorpark, California, party of the first part, hereinafter referred to and designated as the Lessor, and E. F. Smith, party of the second part, of Los Angeles, California, hereinafter referred to and designated as the Lessee:

Witnesseth

First: That the Lessor for and in consideration of the rents hereinafter reserved, and the covenants, promises and agreements herein contained and expressed, on the part of the Lessee to be kept, performed and fulfilled, does by these presents, demise, lease and let unto said Lessee all the following described property:

That certain real property situated in the City of Bell, County of Los Angeles, State of California and more specifically described as the Easterly 204.21 feet, measured from the present Westerly line of Atlantic Blvd., of Lots 4 and

## Exhibit "A"—(Continued)

6, Block "F", of the Grider and Hamilton's Subdivision of the East Portion of Bell Tract, as per map recorded in Book 2, Page 94 of Maps, in the office of the County Recorder of Los Angeles County; with the appurtenances:

To Have and to Hold the above described premises with the rights, privileges, easements and appurtenances attaching to and belonging to said Lessor for the term of five (5) years, from the first day of August, 1942, for, during, until and including the first day of August, 1947, the said Lessee paying rent therefor as hereinafter provided.

Second: That said Lessee, in consideration of the leasing of the premises aforesaid, does hereby covenant and agree to and with the said Lessor to pay the rent, the sum of Eighty-two Hundred and Eighty (\$8280.00) Dollars, for the said term of five years in installments as follows:

The sum of One Hundred and Twenty-five (\$125.00) Dollars on the first day of each and every month for twelve months beginning August 1st, 1942; the sum of One Hundred and Thirty (\$130.00) Dollars on the first day of each and every month for twelve months beginning August 1st, 1943; the sum of One Hundred and Forty (\$140.00) Dollars on the first day of each and every month for twelve months, beginning August 1st, 1944; the sum of One Hundred and Forty-five (\$145.00) Dollars on the first day of each and every month for twelve months, beginning August 1st, 1945; and the sum of One Hundred and Fifty (\$150.00) Dollars on the first

## Exhibit "A"—(Continued)

day of each and every month beginning August 1st, 1946, until the aggregate sum of Eighty-two Hundred and Eighty (\$8280.00) Dollars has been paid. Said monthly rental payable in advance on the first day of each and every month.

Third: The Lessee will also pay and discharge, in addition to the above stated rents, all water, electric, gas and other lighting, heating and power rents and charges for services used by [55] him on the said premises during the term of this lease.

Fourth: The Lessee will also pay and discharge all real estate taxes assessed by the City, County or State, for the land and improvements of the said demised premises during the term of this lease.

Fifth: It is understood that the improvements now on the premises are the property of the Lessee, and it is agreed by the Lessor that these and all other improvements placed on the said property during the term of this lease by the Lessee shall belong to the Lessee and may be removed by him at the expiration of the said term.

Sixth: It is further agreed that if any default shall be made by the Lessee in the payment of installments of rent or of taxes when due, and that said default shall continue for thirty days, the Lessor shall have the right to terminate this lease, and to enter upon said premises and take full possession thereof.

Seventh: It is also agreed that the Lessee shall have the option, and such option is hereby granted to him by said Lessor, of extending the within lease



## Exhibit "A"—(Continued)

for an additional term of five years from August 1st, 1947, to August 1st, 1952, on the same terms and conditions as in this lease set forth, excepting that the installments of rent shall be payable as follows: \$150.00 per month for 12 months, beginning August 1st, 1947; \$170.00 per month for 12 months, beginning August 1st, 1948; \$175.00 per month for 12 months, beginning August 1st, 1949; \$185.00 per month for 12 months, beginning August 1st, 1950; and \$195.00 per month for 12 months, beginning August 1st, 1951, until the expiration of said extended term, being August 1st, 1952.

Eighth: The expressions, terms, conditions, requirements and obligations of this lease are binding upon and shall inure to the benefit of the parties hereto, their heirs and administrators and successors in interest, and shall be construed covenants running with the land.

In Witness Whereof, the parties hereto have hereunto set their hands the day and year first above written.

/s/ E. F. SMITH,  
Lessee.

/s/ CHAS. E. KINDIG,  
/s/ DAISY KINDIG,  
Lessors.

Appendix: It is mutually agreed that the Lessee will give written notice to the Lessor of his inten-



## Exhibit "A"—(Continued)

tion to exercise the within option on or before May 1, 1947.

/s/ E. F. SMITH,

Lessee.

/s/ CHAS. E. KINDIG,

/s/ DAISY KINDIG,

Lessors. [56]

## EXHIBIT "B"

[Plaintiff's Exhibit No. 6 at Trial]

February 1, 1942.

E. F. Smith,  
Los Angeles, California.

Dear Sir:

In consideration of your leasing the Easterly 204.21 feet of our Lot 2 Block F of the Grider & Hamilton's Subdivision of the East Portion of Bell Tract in the City of Bell, County of Los Angeles, State of California as per map recorded in Book 3 Page 36 of Maps, records of said county, as per lease dated February 1, 1942, we the undersigned hereby grant to you the following option:

The aforementioned lease grants to you the option to lease the said premises for an additional term of fifty-four months, i.e., from August 1, 1947, to February 1, 1952, and we, the undersigned, do hereby grant to you the option to lease the said premises for an additional term of six months, from February 1, 1952, to August 1, 1952, at the same rental and on the same terms as set forth in the

Exhibit "B"—(Continued)

option covering the term from August 1, 1947, to February 1, 1952.

In Witness Whereof we have hereunto set our hands the day and year first above written.

/s/ ETHYL WILLIAMS HARTLEY

/s/ SARAH MURIEL WELLINGS.

LEASE

This Indenture made this 1st day of February 1942 between Thomas A. McLenaghan, as Administrator of the estate of E. T. Williams, deceased, of San Pedro, California, hereinafter designated as the Lessor and E. F. Smith of Los Angeles, California, hereinafter designated as the Lessee:

Witnesseth: That the Lessor for and in consideration of the payment of the rents hereinafter reserved and the covenants, promises and agreements herein contained and expressed on the part of the Lessee to be kept performed and fulfilled, does by these presents demise, lease and let unto said Lessee, all of the following described property, to-wit:

That certain real property situated in the City of Bell, County of Los Angeles, State of California, and more particularly described as the Easterly 204.21 feet, measured from the present Westerly line of Atlantic Blvd., of Lot 2 of Block F of the Grider and Hamilton's Subdivision of the East Portion of Bell Tract, as per map recorded in Book 3 Page 36 of Maps in the office of the County Recorder of said county; with the appurtenances:

## Exhibit "B"—(Continued)

To Have and to Hold the above premises with the rights, privileges, easements and appurtenances attaching to and belonging to said Lessor for the term of five years from the 1st day of August 1942 until and including the 1st day of August 1947, the Lessee paying rent therefor as hereinafter provided.

That the said Lessee in consideration of the leasing of the premises aforesaid, does hereby covenant and agree to and with the said Lessor, to pay the rent, the sum of Six Thousand Dollars (\$6000) for the said term of five years in installments, as follows: The sum of One Thousand Dollars (\$1000) which was paid to the Lessor by the Lessee on August 28, 1941 together with the sum of One Thousand Dollars (\$1000) paid upon the execution and delivery of this lease together with the interest on said sums, constitute the payment of the rental for the first Twenty-two and one-third months of this lease, to the 10th day of June, 1944 and the Lessor hereby acknowledges receipt of the said Twenty-two and one-third months rental equivalent to the sum of Two Thousand Two Hundred Thirty-three and 33/100 Dollars (\$2233.33). The Lessee agrees to pay the Three Thousand Seven Hundred Sixty-six and 67/100 Dollars (\$3766.67) balance of rental as follows: the sum of \$166.67 on the 1st day of July 1944 and the sum of \$100 on the 1st day of each and every month thereafter for 36 months, until the aggregate sum of rental of \$6000 has been paid.

The Lessee will also pay and discharge, in addition to the above rents, all water, electricity, gas,

Exhibit "B"—(Continued)

lighting, heating and power rents and charges for services used by said Lessee on said premises during the term of this lease.

The Lessee will also pay and discharge all real estate taxes assessed by the City, County or State for the land and improvements of said demised premises for the period covered by the term of this lease.

It is understood that the improvements now on the premises are the property of and belong to the Lessee and it is agreed by the Lessor that these and all other improvements placed on the said premises by the Lessee during the term of this lease or any extension of said lease, shall belong to the said Lessee and may be removed by him at the expiration of the term. [58]

It is further agreed that if any default shall be made by the Lessee in the payment of rent or of taxes, when due and said default shall continue for thirty days, after notice, the Lessor shall have the right to terminate this lease, and to enter upon said premises and take full possession thereof.

It is also agreed that the Lessee shall have the **option and such option** is hereby granted to him by said Lessor of extending the term of this lease for an additional term of four years and six months, from August 1, 1947 to February 1, 1952 on the same terms and conditions as in this lease set forth excepting that the installments of rental shall be payable as follows: The sum of \$125 payable monthly in advance on the 1st day of each and



## Exhibit "B"—(Continued)

every month beginning August 1, 1947 for fifty-four months to February 1, 1952 until the aggregate sum of rent of Six Thousand Seven Hundred fifty Dollars (\$6750) has been paid.

The Lessee further agrees that in consideration of the leasing of the above described premises as aforesaid, that he will on and after February 1, 1942 release that portion of the said Lot 2 hereinabove described which is not included in this lease, from the lease which the Lessee now holds and which covers all of said Lot 2 and the Lessee agrees to surrender possession of said portion not included herein on or before February 1, 1942.

The expressions, terms, conditions and obligations of this lease are binding upon and shall inure to the benefit of the parties hereto, their heirs, administrators and successors in interest, and shall be construed covenants running with the land.

In Witness Whereof the parties hereto have hereunto set their hands the day and year first above written.

/s/ THOMAS A. McLENAGHAN,  
Administrator of the estate of E. T. Williams, deceased.

/s/ E. F. SMITH

[59]



EXHIBIT "C"

[Plaintiff's Exhibit No. 7 at Trial]

SUPPLEMENTARY AND MODIFIED  
AGREEMENT

This supplementary and modified agreement entered into this 12th day of June, 1946, by and between E. F. Smith, of the County of Los Angeles, State of California, hereinafter referred to as Party of the First Part, and Charles Schuster, Leo A. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster, a co-partnership, doing business under the firm name and style of Jim Dandy Markets, hereinafter referred to as Parties of the Second Part,

Witnesseth

Whereas the Party of the First Part and Parties of the Second Part did heretofore, to-wit: on the 1st day of July, 1945, make and enter into a written agreement pertaining to the sale and purchase of certain trucks, the sale and purchase of certain merchandise, the leasing and sub-leasing of certain markets as well as the leasing of certain fixtures, machinery and equipment located and contained in said market premises, to which agreement reference is hereby made for further particulars; and

Whereas the Parties thereto and hereto desire by their mutual consent, to amend said agreement in the respects hereinafter mentioned,

Now Therefore in consideration of the mutual covenants and agreements of the Parties it is understood and agreed as follows:

1. The Party of the First Part agrees to sell, and the Parties of the Second Part agree to pur-

## Exhibit "C"—(Continued)

chase concurrently herewith, all of the fixtures, machinery and equipment located and contained in all of the markets referred to in the Agreement hereinabove mentioned, for a total consideration of Two Hundred Twenty Five Thousand Dollars (\$225,000.00); [60] under the terms of said prior Agreement the Parties of the Second Part deposited with the Party of the First Part the sum of Fifty Thousand Dollars (\$50,000.00) as security for the performance of the terms and conditions thereof, and with respect to said sum of money it is understood and agreed that Thirty Thousand Dollars (\$30,000.00) thereof shall be applied by the Party of the First Part on account of the purchase price mentioned herein; the balance of such purchase price in the sum of One Hundred Ninety Five Thousand Dollars (\$195,000.00) shall be paid, in escrow, to the Party of the First Part by the Parties of the Second Part at the rate of Five Thousand Dollars (\$5,000.00), or more, per month, commencing on the 1st day of August, 1946 and on the 1st day of each and every month thereafter until said balance is fully paid, together with interest thereon at the rate of six per cent. (6%) per annum, payable monthly with each principal payment.

2. With respect to the balance of the sum of Fifty Thousand Dollars (\$50,000.00) after applying the sum of Thirty Thousand Dollars (\$30,000.00) on account of the purchase price, as specified in the preceding paragraph, which said bal-

## Exhibit "C"—(Continued)

ance represents the sum of Twenty Thousand Dollars (\$20,000.00), the same shall continue to be held and retained by the Party of the First Part as security for the faithful performance by the Parties of the Second Part of the terms covenants and conditions of that certain lease entered into by and between the Party of the First Part as Lessor and the Parties of the Second Part as Lessee, pertaining to the four (4) market locations owned by the Party of the First Part, and which are referred to as Central Avenue Market, Western Avenue Market, Figueroa Street Market and Norwalk Market; [61] if the Parties of the Second Part have faithfully complied with all the terms and conditions of the lease, the Party of the First Part will retain the said sum of Twenty Thousand Dollars (\$20,000.00), as aforesaid, and will give the Parties of the Second Part free rental during the last eleven (11) months of the lease on the Central Avenue Market, Western Avenue Market and Figueroa Street Market and twelve (12) months free rental on the Norwalk Market. On said sum of Twenty Thousand Dollars (\$20,000.00) the Party of the First Part agrees to pay to the Parties of the Second Part interest thereon at the rate of six per cent. (6%) per annum, commencing July 1, 1946 payable annually on the 1st day of July of each year commencing July 1, 1947 and continuing until the last year of the lease.

3. Concurrently with the execution hereof an escrow shall be opened wherein the Party of the First Part shall deposit a separate Bill of Sale to

## Exhibit "C"—(Continued)

the fixtures, machinery and equipment, located in each of the several markets herein referred to, the same to be free and clear of all claims, liens or encumbrances; in addition thereto a separate Bill of Sale shall be deposited covering all items of office furniture, fixtures and equipment which are referred to in the prior Agreement hereinabove mentioned. Party of the First Part further agrees to deliver to and deposit in said escrow the original leases on the Ontario Market, Watts Market, Atlantic Boulevard Market and Sixth Street Market, together with a written assignment of each of said leases in favor of Parties of the Second Part, where such assignment is permitted in the lease, and where written consent to assign is required in the lease, he will deliver such assignment if permission can be secured; if permission to assign any of the leases cannot be obtained then the existing sub-lease on said market between the Parties hereto as Lessor and Lessee, respectively, shall remain in full force [62] and effect in accordance with the terms and provisions of the original Agreement except that the Parties of the Second Part, as Lessees, shall have the right to assign the same without procuring or obtaining the consent or permission of the Party of the First Part, when they have deposited in escrow the sum of money required in Paragraph 4.

The lease now in existence upon the aforesaid fixtures, machinery and equipment, heretofore entered into by and between the Party of the First Part as Lessor and the Parties of the Second Part



Exhibit "C"—(Continued)

as Lessee, shall be deemed, and is hereby, cancelled and terminated as of the 1st day of July, 1946, and all payments of rental thereon shall cease as of said date.

With reference to the leases and the written assignments thereof, to be deposited in escrow by the Party of the First Part, it is understood and agreed that the sub-leases pertaining to the same subject matter shall be deemed cancelled and terminated as of the date of delivery from escrow of the leases and assignments thereof, as set forth in Paragraph 4, and the Parties of the Second Part shall be released and discharged of and from any and all liability accruing thereunder from and after said date.

4. Notwithstanding anything to the contrary hereinafter contained in the within Paragraph, it is understood and agreed that when the Parties of the Second Part have caused to be deposited in escrow the total sum of One Hundred Ninety Five Thousand Dollars (\$195,000.00), their obligation under this agreement shall be deemed to have been fully paid and discharged, and all leases, sub-leases, assignments and Bills of Sale, remaining undelivered in escrow, shall be immediately delivered to the Parties of the Second Part without the payment of any further consideration. [63]

The escrow instructions to be executed by the parties hereto shall provide that in the event the Parties of the Second Part desire to obtain delivery from the escrow of any of the Bills of Sale, as well as the lease and the assignment thereof, pertaining



## Exhibit "C"—(Continued)

to the market location where the fixtures described in the Bill of Sale are located, they shall have the right to demand such delivery at any time, upon the condition that the said Parties of the Second Part shall, concurrently with such demand, deposit in said escrow the sum of money shown opposite each market in the following schedule, after first deducting therefrom the percentage of the monthly payments made prior to the date upon which such demand is presented, such percentage appearing after each market, to-wit: [64]

|                 |             |      |
|-----------------|-------------|------|
| Western Avenue  | \$39,975.00 | 20½% |
| Ontario         | 28,275.00   | 14½% |
| Sixth Street    | 27,300.00   | 14%  |
| Atlantic Blvd.  | 27,300.00   | 14%  |
| Central Avenue  | 23,400.00   | 12%  |
| Watts           | 19,500.00   | 10%  |
| Figueroa Street | 14,625.00   | 7½%  |
| Norwalk         | 14,625.00   | 7½%  |

The Party of the First Part shall have the right to withdraw from escrow all funds deposited therein by the Parties of the Second Part, at any time after said funds are so deposited, subject only to the filing of any claims against him in said escrow and subject only to the deposit in said escrow of the Bills of Sale, the leases and the assignments thereof, as hereinbefore stated.

Notwithstanding anything to the contrary herein contained it is understood and agreed that the Parties of the Second Part shall not have the right

Exhibit "C"—(Continued)

to demand from the escrow a delivery of the Bill of Sale pertaining to the office furniture, fixtures and equipment until such time as the entire amount of the purchase price herein mentioned has been fully paid.

If any claims are presented in escrow against said Party of the First Part the same shall be paid by him before the close of said escrow.

5. As to any leases assigned by the Party of the First Part to the Parties of the Second Part, the said Parties of the Second Part do hereby agree to indemnify the said Party of the First Part and to hold him harmless of and from any and all liability which may or might accrue under such leases subsequent to the assignment thereof by him to the Parties of the Second Part.

6. As to those market sites owned by the Party of the First Part and which have been leased to the Parties of the Second Part, and which are referred to as Central Avenue Market, Western Avenue Market, Figueroa Street Market and [65] Norwalk Market, the said Party of the First Part agrees that the said Parties of the Second Part may, without obtaining the consent or permission of the Party of the First Part, sub-lease some or all of such market sites or assign the lease and/or leases pertaining to one or more of such market sites; the proposed assignee shall assume and agree to be bound by the terms and conditions of said lease and/or leases, in writing, and a copy of such assignment and assumption shall be delivered to the

## Exhibit "C"—(Continued)

Party of the First Part, whereupon the Parties of the Second Part shall be released and discharged of and from any and all liability accruing under such lease and/or leases which may or might accrue subsequent to the date of such assignment.

In view of the fact that the lease on the four (4) market sites owned by the Party of the First Part is represented by one instrument, it is understood and agreed that said Party of the First Part will, upon request of the Parties of the Second Part, execute and deliver individual leases upon the several market sites in order to make convenient the sub-leasing of the premises involved or the assignment of said lease and/or leases; such individual leases shall be on the exact terms and conditions now contained in the one instrument except as to the payment of rental for fixtures, machinery and equipment, the deposit of the sum of Twenty Thousand Dollars (\$20,000.00) as security for the faithful performance of the terms, conditions and covenants of said lease and the giving to the Parties of the Second Part of free rental during the last eleven (11) months of the lease on the Central Avenue Market, Western Avenue Market, and Figueroa Street Market and twelve (12) months free rental on the Norwalk Market, and except as to any other matter contained therein which is inconsistent with the provisions of this agreement.

7. The Parties of the Second Part will, at their own expense, on and after the 1st day of July, 1946, keep said [66] fixtures, machinery and equipment

Exhibit "C"—(Continued)

fully insured with loss payable to the Party of the First Part, until the full purchase price has been paid; and will further, during said period, pay all personal property taxes levied or assessed against said fixtures, machinery and equipment.

8. The Party of the First Part shall have no further concern in connection with the renewal or extension of any of said sub-leases in which he is named as Lessee, and which are being assigned by him to the Parties of the Second Part concurrently herewith; the sole responsibility for taking such action shall be with the Parties of the Second Part.

9. Except as herein amended or modified or except where the provisions of said prior Agreement hereinabove referred to are inconsistent herewith, the said Agreement shall otherwise remain in full force and effect.

In Witness Whereof the parties hereto have hereunto affixed their hands and seals the day and year in this agreement first above written.

Party of the First Part:

/s/ E. F. SMITH.

Parties of the Second Part a co-partnership doing business under the firm name and style of Jim Dandy Markets:

/s/ CHARLES SCHUSTER,

/s/ LEO A. GOLDBERG,

/s/ EARL I. SWETOW,

/s/ MAX M. BERICK,

/s/ NORMAN SCHUSTER. [67]



## EXHIBIT "D"

[Plaintiff's Exhibit No. 8 at Trial]

Sale of Business

Escrow No. 7559-E

## ESCROW INSTRUCTIONS

Huntington Park, Calif.

June 13th, 1946.

To Morrison Escrow Company

For the purpose of consummating Bulk Sale, the undersigned E. F. Smith, whose address is....., known herein as Vendor and Charles Schuster, Leo A. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster, a co-partnership, doing business under the firm name and style of Jim Dandy Markets, whose address is 8451 Crenshaw Blvd., Inglewood, Calif, known herein as Vendee, will hand you within the time limit herein specified funds and documents to enable you to carry out the instructions as herein directed.

Vendor will deposit Bills of Sale executed by him in favor of Vendee covering all machinery, fixtures and equipment of a certain business known as E. F. Smith Public Markets, located at various locations.

Vendee will hand you the sum of \$ No funds—However, vendee and vendor will deposit into escrow an agreement, executed by both vendee and vendor, setting forth, among other things, the fact that Vendor acknowledges the application of the sum of \$30,000.00 on the total purchase price for the machinery, fixtures and equipment mentioned hereinbefore and further setting forth the fact that the vendee shall pay the balance of said purchase price



## Exhibit "D"—(Continued)

in the sum of \$195,000.00 as follows: In installments of \$5,000.00 or more per month, commencing on the 1st day of August, 1946, and on the 1st day of each and every month thereafter until said balance is fully paid, together with interest thereon at the rate of 6% per annum, payable monthly with each principal payments, being the total sale consideration.

Vendor will also deposit into this escrow certain leases, assignments of leases, consents to assignments and/or sub-leases as specified in the aforementioned Agreement for delivery to the vendee in accordance with additional instructions handed you herewith.

In this escrow you are not to be concerned with securing the vendees approval of said leases, assignments of leases, consents to assignments and/or sub-leases, nor are you to be concerned with securing said vendees approval of the inventory to be included in the Bills of Sale called for herein. The delivery of said documents into this escrow by the vendor (or his agent) shall constitute the vendees approval of the terms and conditions and provisions of said documents including the inventory described in each of the Bills of Sale, if the contents of all such documents are approved by both vendee and vendor outside of this escrow and before said delivery is made to your office.

Vendor and/or Vendee will hand you in duplicate Notice of Intended Sale and also Notice of Intended Mortgage if Chattel Mortgage is delivered through this escrow. Said Notice(s) shall provide for the sale, transfer and assignment and/or mortgage and

## Exhibit "D"—(Continued)

payment and/or delivery of the consideration on the 5th day of July, 1946, at 10:00 o'clock a.m. at the office of the Morrison Escrow Company, 2640 Zoe Avenue, Huntington Park, California. You are directed to forward at this time One copy of each notice to the County Recorder for Recordation and the other copy to a newspaper of general circulation in.....Township with fee for publication and Request that same be published in accordance with Section 3440 of the Civil Code of the State of California. Except that the notice effecting the Ontario Market is to be published and recorded in San Bernardino County.

Each party will hand you at or before the time set for transfer in above Notice(s) all funds and instruments required from him to enable you to comply with these instructions.

At the time of sale as indicated herein, provided all other conditions of this escrow have been complied with, out of the purchase funds deposited in this escrow you are to pay any and all bills which have been presented against this business that have been approved by the Vendor for payment, and you are to hold sufficient funds to take care of any bills which are presented in this escrow which are not approved by the seller until such time as bills may either have been withdrawn or settlement made thereon.

Also pay and charge to Vendor.

1. Any adjustment chargeable to Vendor.

Balance of sale consideration after payment of

**Exhibit "D"—(Continued)**

Vendor's bills, costs and adjustments are to be paid to the order of the Vendor, including the delivery of any notes or mortgages, if therein provided, and you are to deliver the Bills of Sale and leases to the order of the Vendee in accordance with additional instructions handed you herewith.

The entire costs of this transaction, including your escrow fee, cost of advertising, charge for drawing of instruments and recording, insurance transfer fee and mortgage clause, and any other costs incurred are to be divided equally between Vendor and Vendee. [68]

The following Adjustments Only are required in this escrow: None.

If the bills presented, together with your costs and charges and the agent's commission, are in excess of funds deposited, you are to hold all funds and documents for further joint instructions from the Vendor and the Vendee.

Morrison Escrow Company Is Not To Be Concerned With Any Unpaid Retail Sales, Beverage, Unemployment, Old Age or Social Security Tax or Contribution or Any Other Tax or Contribution, Unless Otherwise Specifically Instructed in This Escrow.

It is understood that the escrow holder will not be liable to the Vendee or Mortgagee or any other party on account of any property included hereunder which is subject to any conditional sale or lease contracts, or other form of lease, contract or agreement, or Chattel Mortgage, or on account of

## Exhibit "D"—(Continued)

liens of any kind or nature, whatsoever, or other defects in title which may exist with respect to any such property.

It is expressly understood by the parties to this escrow that no Chattel Search is required covering the property involved herein, and Morrison Escrow Company is hereby relieved of all liability for not procuring such Chattel Search unless specifically provided for in writing in this escrow.

You will, as my agent, assign any fire insurance policies of mine handed you. You may assume that premiums on said policies have been paid and that the policies have not been hypothecated.

Make disbursements by your check. Documents and checks in my favor to be mailed to my address shown below, unless you are otherwise instructed.

If the conditions of this escrow have not been complied with at the time herein provided you are nevertheless to complete the same as soon as the conditions (except as to time) have been complied with, unless I shall have made written demand upon you for the return of money and/or instruments deposited by me.

No Notice, Demand or Change of Instructions Shall Be Of Any Effect In This Escrow Unless Given In writing By All Parties Affected Thereby: In the event conflicting demands are made or notices served upon you with respect to this escrow, the parties hereto expressly agree that you shall have the absolute right at your election to do either or both of the following: withhold and stop all



## Exhibit "D"—(Continued)

further proceedings in, and performance of, this escrow, or file a suit in interpleader and obtain an order from the court requiring the parties to interplead and litigate in such court their several claims and rights amongst themselves. In the event such interpleader suit is brought, you shall ipso facto be fully released and discharged from all obligations to further perform any and all duties or obligations imposed upon you in this escrow, and the parties jointly and severally agree to pay you all costs, expenses, and reasonable attorney's fees expended or incurred by you, the amount thereof to be fixed and a judgment thereof to be rendered by the court in such suit.

You are not to be held liable for the sufficiency or correctness as to form, manner or execution, or validity of any instrument deposited in this escrow, nor as to identity, authority, or rights of any person executing the same, nor for failure to comply with any of the provisions of any agreement, contract, or other instrument filed herein or referred to herein, and your duties hereunder shall be limited to the safekeeping of such money, instruments, or other documents received by you as escrow holder, and for the disposition of same in accordance with the written instructions accepted by you in this escrow.

All parties hereto further agree, jointly and severally, to pay on demand, as well as to indemnify and hold you harmless from and against all costs,



## Exhibit "D"—(Continued)

damages, judgments, attorney's fees, expenses, obligations and liabilities of any kind or nature which, in good faith, you may incur or sustain in connection with, or arising out of this escrow, and you are hereby given a lien upon all the rights, titles and interest of each of the undersigned in all escrowed papers and other property and monies deposited in this escrow, to protect your rights and to indemnify and reimburse you under this agreement.

It is agreed by the parties hereto that so far as your rights and liabilities are involved, this transaction is an escrow and not any other legal relation and you are an escrow holder only on the foregoing expressed terms, and you shall have no responsibility of notifying me or any of the parties to this escrow of any sale, resale, loan, exchange, or other transaction involving any property herein described or of any profit realized by any person, firm or corporation (broker, agent and parties to this and/or any other escrow included) in connection therewith, regardless of the fact that such transaction(s) may be handled by you in this escrow or in another escrow.

The instructions may be executed in counterparts, each of which so executed shall, irrespective of the date of its execution and delivery, be deemed an original, and said counterparts together shall constitute one and the same instrument.

Any amended, supplemental, or additional in-

Exhibit "D"—(Continued)

structions given shall be subject to the foregoing conditions.

The Foregoing Terms, Conditions, Provisions and Instructions Have Been Read And Are Understood And Agreed To By Each Of The Undersigned.

By /s/ CHARLES SCHUSTER,

By /s/ LEO A. GOLDBERG,

By /s/ E. F. SMITH [69]

ADDITIONAL ESCROW INSTRUCTIONS

Huntington Park, Calif.

June 13th, 1946

Morrison Escrow Company:

The undersigned E. F. Smith hands you herewith the following documents:

1. Supplementary and Modified Agreement dated June 12th, 1946, executed by E. F. Smith, designated therein as Party of the First Part, and Charles Schuster, Leo A. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster, a co-partnership, doing business under the firm name and style of Jim Dandy Markets, designated therein as Parties of the Second Part.

2. Nine Bills of Sale being one on the office furniture, fixtures and equipment located in the premises known as 4209 South Figueroa Street, Los Angeles, California, and one on each of the following described markets: Western Avenue Market, Ontario Market, Sixth Street Market, Atlantic Boulevard

## Exhibit "D"—(Continued)

Market, Central Market, Watts Market, Figueroa Street Market, and Norwalk Market.

3. Eight leases, being either original leases, original leases with written assignments, original leases with written assignments and consents to said assignments, or sub-leases, covering the eight aforementioned markets.

I am placing item 1 above described in your hands for collection only of an indebtedness described therein as being in the sum of \$195,000.00 and payable \$5,000.00 or more on the 1st day of each month commencing August 1st, 1946, and so continuing until said sum has been fully paid, together with interest on the unpaid balance of said sum at the rate of 6% per annum, commencing July 1st, 1946, and payable monthly with each principal payment.

The documents described in items 2 and 3 above mentioned are to be delivered to the parties of the second part, as designated in item 1 above described, or their heirs, administrators, executors or assigns, but only when this indebtedness has been fully paid, Except That, upon request of said second parties, you may deliver any of the Bills of Sale as well as the lease and the assignment thereof, pertaining to the market location where the fixtures described in said Bills of Sale are located, when said parties of the second part pay on this indebtedness the sum of money shown in the following schedule, less the applicable percentage of the monthly payments

Exhibit "D"—(Continued)

made prior to the date upon which such demand is presented, to wit:

|                        |             |        |
|------------------------|-------------|--------|
| Western Avenue Market  | \$39,975.00 | 201½%  |
| Ontario Market         | 28,275.00   | 141½%* |
| Sixth Street Market    | 27,300.00   | 14 %   |
| Atlantic Market        | 27,200.00   | 14 %*  |
| Central Avenue Market  | 23,400.00   | 12 %   |
| Watts Market           | 19,500.00   | 10 %   |
| Figueroa Street Market | 14,625.00   | 71½%   |
| Norwalk Market         | 14,625.00   | 71½%*  |

---

\$195,000.00

[\* Longhand figures in margin illegible.]

Notwithstanding anything contained in the aforementioned, as soon as the total amount paid into the escrow by the vendee equals the sum of \$195,000.00, all remaining Leases, Sub-Leases, Assignments, and Bills of Sale remaining in this Escrow shall be immediately delivered to the vendees and no further payments shall be due under this escrow agreement. The Bill of Sale on the office fixtures is to be released only when the entire indebtedness is fully paid, rather than when and if the 71½% is paid on the Figueroa Street Market.

It is understood by all parties to this transaction that you are in no way concerned with the terms and conditions of the said Agreement described as item 1 above, nor with the interpretation of any of the provisions thereof. The executed copy of said agreement is deposited in escrow for in-

## Exhibit "D"—(Continued)

formation only and the payments thereunder are set forth in the escrow instructions handed you concurrently. Your only responsibility, in-so-far as this collection is concerned, is to see to the proper application of such payments as are received by your office, the immediate transmittal thereof to E. F. Smith, or order, and the delivery of the documents deposited with you in accordance with the provisions of these escrow instructions.

No Amendments or changes in these escrow instructions are to be recognized by you unless submitted in writing and executed by all parties hereto, their heirs, executors, administrators or assigns.

/s/ E. F. SMITH.

Approved: Jim Dandy Markets, a co-partnership.

By /s/ CHARLES SCHUSTER,  
Partner,

By /s/ LEO A. GOLDBERG,  
Partner. [70]

## EXHIBIT "E"

[Plaintiff's Exhibit No. 9 at Trial]

## BILL OF SALE

Know All Men By These Presents: That E. F. Smith, hereinafter designated as the Seller, for and in consideration of the sum of One Dollar (\$1.00) and other valuable consideration, lawful money of the United States of America, to him in hand paid, by Charles Schuster, Leo A. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster, a



## Exhibit "E"—(Continued)

co-partnership, doing business under the name and style of Jim Dandy Markets, hereinafter designated as the Buyer, the receipt whereof is hereby acknowledged, does by these presents grant, bargain, sell and convey unto the said Buyer, their executors, administrators and assigns, all store fixtures, equipment and machinery generally referred to in a certain Agreement dated July 1st, 1945 and a certain Supplementary and Modified Agreement dated June 12, 1946, and particularly set forth in Exhibit "C" attached to the sub-lease dated July 1, 1945 to which reference is hereby made and by this reference made a part of this bill of sale, wherein Thomas A. McLenaghan as Administrator of the Estate of E. T. Williams, Deceased, is the lessor in the original lease and the undersigned is the original lessee. Said property so leased is referred to as Atlantic Store. This Bill of Sale shall be deposited in escrow as set forth in the Supplementary and Modified Agreement of June 12, 1946 and shall become effective upon the completion of the terms set forth in said Supplementary and Modified Agreement, particularly section 4 thereof.

To Have And To Hold the same to the said buyers, their executors, administrators and assigns forever. And the said seller does for his heirs, executors and administrators, covenant and agree to and with the said Buyer, their executors, administrators and assigns, to warrant and defend the title to the said property, goods, and chattels hereby conveyed,

Exhibit "E"—(Continued)  
against the just and lawful [71] claims and demands  
of all persons whomsoever.

Dated this 27th day of June, 1946.

/s/ E. F. SMITH.

State of California,  
County of Los Angeles—ss.

On the 27th day of June, 1946 before me, the undersigned, a Notary Public in and for said County and State, personally appeared, E. F. Smith, known to me to be the person whose name is subscribed to the within Instrument, and acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

/s/ JAS. R. JOHNSTON,  
Notary Public in and for the said County and  
State. [72]

EXHIBIT "F"  
[Plaintiff's Exhibit No. 10 at Trial]

#### ASSIGNMENT OF LEASE

Know All Men By These Presents: That I, E. F. Smith, of the County of Los Angeles, State of California, for and in consideration of the covenants and agreements set forth in a certain Agreement, dated July 1, 1945 and Supplementary and Modified Agreement, dated June 12, 1946, do hereby sell, assign, transfer and set over unto Charles Schuster,

## Exhibit "F"—(Continued)

Leo A. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster, a certain indenture and lease dated February 1, 1942 by and between Thomas A. McLenaghan as administrator of the Estate of E. T. Williams, deceased, and the undersigned, wherein certain land and buildings therein described were demised to the undersigned for a period of five (5) years from August 1, 1942 to August 1, 1947, and that certain indenture and lease dated September 29, 1941 for a term of five (5) years from August 1, 1942 to and including August 1, 1947 at the rental therein stated, together with any renewal or extension of said leases which may be secured by the undersigned, subject to the rents, covenants, and conditions contained in said leases, and herein referred to as Atlantic Store—It Being Understood, However, that this assignment shall not become effective until the assignee herein has complied with all of the terms and conditions in any way affecting the property hereby leased, as set forth in the aforementioned agreement dated July 1, 1945 and the aforementioned supplementary and modified agreement dated June 12, 1946 particularly Section 4 of said Supplementary and Modified Agreement.

It Is Further Understood that the undersigned has heretofore sub-leased the property described in said leases hereby being assigned, and said sub-lease shall be null and void upon this assignment going into effect. It Is Understood, However, that in the event approval by the lessor is necessary to make this [73] assignment and said approval is not se-

## Exhibit "F"—(Continued)

cured, the said sub-lease hereinbefore referred to shall remain in effect during the life of the Agreement and the Supplementary and Modified Agreement.

It Is Further Understood and Agreed by and between the parties hereto, that the assignor hereby agrees that the assignees, may, without obtaining the consent or permission of said assignor, sub-lease the whole or any part of the property herein leased, or assign the leases pertaining to such market site, provided permission is necessary and secured by the undersigned to make this assignment.

In Witness Whereof, I have hereunto subscribed my name this 27th day of June, 1946.

/s/ E. F. SMITH.

We, the undersigned have read the foregoing assignment and hereby accept the same and agree to conform with all of the terms and conditions required in the Leases and the Agreements referred to in this assignment.

Dated June 27th, 1946.

/s/ CHARLES SCHUSTER,

/s/ LEO A. GOLDBERG,

/s/ EARL I. SWETOW,

/s/ MAX M. BERICK,

/s/ NORMAN SCHUSTER. [74]

State of California,  
County of Los Angeles—ss.

Lester Weisz being by me first duly sworn, deposes and says: That he is the Secretary of Jim



Exhibit "F"—(Continued)

Dandy Markets, Inc., the defendant in the foregoing and above entitled action; that he has read the foregoing Answer of Defendant Jim Dandy Markets, Inc., to Cross-Claim of Defendant E. F. Smith and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters he believes it to be true.

/s/ LESTER WEISZ.

Subscribed and Sworn to before me this 29th day of October, 1947.

(Seal) /s/ HARRY G. SADICOFF,  
Notary Public in and for said County and  
State. [75]

(Affidavit of Service by Mail—1013a—C.C.P.)

State of California,  
County of Los Angeles—ss.

Edward I. Harris, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business address is 727 W. Seventh Street, Los Angeles 14, California, that on the 29th day of October, 1947, affiant served the within Answer of Defendant, Jim Dandy Markets, Inc., to Cross-Claim of Defendant E. F. Smith on the Defendant, E. F. Smith, in said action, by placing a true copy thereof in an



## Exhibit "F"—(Continued)

envelope addressed to the attorneys of record for said Defendant, E. F. Smith, at the office address of said attorney, as follows: (Here quote from envelope name and address of addressee.) "Clyde Thomas and Milan Medigovich, 411 W. 5th Street, Los Angeles 13, California, and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States Post Office at Los Angeles, California, where is located the office of the attorney for the person by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed, or there is a regular communication by mail between the place of mailing and the place so addressed.

/s/ EDWARD J. HARRIS.

Subscribed and sworn to before me this 29th day of October, 1947.

(Seal) /s/ HARRY G. SADICOFF,

Notary Public in and for the County of Los Angeles,  
State of California.

[Endorsed]: Filed Oct. 30, 1947. [76]

[Title of District Court and Cause.]

CROSS-CLAIM OF DEFENDANT JIM DANDY  
MARKETS, INC., AGAINST DEFENDANT,  
E. F. SMITH

Comes now the defendant Jim Dandy Markets, Inc., and for cross-claim against the defendant E. F. Smith, complains and alleges:

I.

That on or about the 29th day of September, 1941, Charles E. Kindig and Daisy Kindig, as Lessors, and the defendant E. F. Smith, as Lessee, entered into a Lease upon certain real property in the City of Bell, County of Los Angeles, State of [77] California; that a photostatic copy of said Lease is attached to the Answer of the defendant Jim Dandy Markets, Inc., to the Cross-claim of the defendant E. F. Smith, marked Exhibit "A", and by reference is made a part hereof as if herein fully set forth.

II.

That on or about the 1st day of February, 1942, Thomas A. McLenaghan, as Administrator of the Estate of E. T. Williams, as Lessor, and the defendant E. F. Smith, as Lessee, entered into a Lease upon certain real property situated in the City of Bell, County of Los Angeles, State of California; that a photostatic copy of said Lease is attached to the Answer of the defendant Jim Dandy Markets, Inc. to the Cross-claim of the defendant E. F. Smith, marked Exhibit "B", and by reference is made a part hereof as if herein fully set forth.

## III.

That the real properties described in said Exhibit "A" and Exhibit "B" adjoin each other.

## IV.

That there was a building upon said properties known as the "Atlantic Store", which was totally destroyed by fire on the 14th day of January, 1947.

## V.

That on the 1st day of July, 1945, the defendant E. F. Smith, as party of the first part, and Charles Schuster, Leo A. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster, a co-partnership doing business under the name and style of Jim Dandy Markets, entered into an Agreement, a copy of which is attached to the Answer of the defendant E. F. Smith, marked Exhibit "A", and by reference is made a part hereof as if herein fully set forth. [78]

## VI.

That on or about the 12th day of June, 1946, the defendant E. F. Smith, as party of the first part, and Charles Schuster, Leo A. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster, a co-partnership doing business under the name and style of Jim Dandy Markets, as parties of the second part, entered into a "Supplementary and Modified Agreement"; that a photostatic copy of said agreement is attached to the Answer of the defendant Jim Dandy Markets, Inc. to the Cross-claim of defendant E. F. Smith, marked Exhibit "C", and by reference is made a part hereof as if herein fully set forth.

## VII.

That on or about the 5th day of July, 1945, the predecessor of Jim Dandy Markets, Inc. went into possession of said "Atlantic Store"; that on or about the 5th day of October, 1946, the defendant Jim Dandy Markets, Inc. went into possession of said "Atlantic Store" by virtue of the conveyances and assignment of said "Atlantic Store", and all rights that the partnership known as Jim Dandy Markets had in the leases above referred to, or in the agreements referred to, and was in possession of said "Atlantic Store" at the time the building was destroyed by fire.

## VIII.

That concurrently with the execution and delivery of said "Supplementary and Modified Agreement", and in accordance with its terms, covenants and conditions, an escrow was commenced with the Morrison Escrow Company, and Escrow Instructions and Modified Escrow Instructions were given to said Morrison Escrow Company; that a photostatic copy of said Escrow Instructions and said Modified Escrow Instructions are attached to the Answer of the defendant Jim Dandy Markets, Inc. to the Cross-claim of the defendant E. F. Smith, marked Exhibit "D", and by reference is made a part hereof as if herein fully set forth. [79]

## IX.

That at the time the said Escrow Instructions and Modified Escrow Instructions were delivered to said Morrison Escrow Company, the defendant E. F. Smith delivered to said Morrison Escrow Company



each and all of the documents required of him to be delivered under the terms, covenants and conditions of said "Supplementary and Modified Agreement" and said Escrow Instructions and Modified Escrow Instructions, including, but not limiting, the following documents, which documents all refer and relate to the said "Atlantic Store":

(a) Lease dated September 29, 1941, between E. F. Smith as Lessee, and Charles E. Kindig and Daisy Kindig as Lessors.

(b) Lease dated February 1, 1942, between E. F. Smith as Lessee, and Thomas A. McLenaghan as Administrator of the Estate of E. T. Williams, Deceased.

(c) Bill of Sale dated June 27, 1946, executed by E. F. Smith in favor of Jim Dandy Markets, a partnership; that a photostatic copy of said Bill of Sale is attached to the Answer of defendant Jim Dandy Markets, Inc. to Cross-claim of Defendant E. F. Smith, marked Exhibit "E", and by reference is made a part hereof as if herein fully set forth.

(d) Assignment of Lease dated June 27, 1946, executed by defendant E. F. Smith in favor of Charles Schuster, Leo A. Goldberg, Earl I. Swetow, Max M. Berick [80] and Norman Schuster; that a photostatic copy of said Assignment is attached to the Answer of the defendant Jim Dandy Markets, Inc., to the Cross-claim of defendant E. F. Smith, marked Exhibit "F", and by reference is made a part hereof as if herein fully set forth.



X.

That at the time said building known as the "Atlantic Store" was totally destroyed by fire on January 14, 1947, all payments required to be made under the provisions of said "Supplementary and Modified Agreement", and under the Escrow Instructions and Modified Escrow Instructions, have been made, and that all amounts due under said "Supplementary and Modified Agreement" and said Escrow Instructions and Modified Escrow Instructions, as relating to said "Atlantic Store" were fully and completely paid to the defendant E. F. Smith by the Defendant Jim Dandy Markets, Inc. on or about the 19th day of March, 1947, and that no amount due or to become due to said E. F. Smith under said "Supplementary and Modified Agreement" or said Escrow Instructions or Modified Escrow Instructions, is unpaid.

XI.

That said defendant E. F. Smith, on or about the 30th day of July, 1947, was paid in full the sum of \$225,000.00 required to be paid to him under said "Supplementary and Modified Agreement," and immediately after the amounts required to be paid, as relating to the said "Atlantic Store", had been paid, Morrison Escrow Company delivered to the defendant Jim Dandy Markets, Inc., the following documents:

(a) Lease dated September 29, 1941, between E. F. Smith as Lessee, and Charles E. Kindig and Daisy Kindig as Lessors. [81]

(b) Lease dated February 1, 1942, between E. F. Smith as Lessee, and Thomas A. McLenaghan as Administrator of the Estate of E. T. Williams, Deceased.

(c) Bill of Sale dated June 27, 1946, executed by E. F. Smith in favor of Jim Dandy Markets, a partnership.

(d) Assignment of Lease dated June 27, 1946, executed by defendant E. F. Smith in favor of Charles Schuster, Leo A. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster.

## XII.

That at the time the building known as the "Atlantic Store" was totally destroyed by fire on January 14, 1947, the defendant Jim Dandy Markets, Inc. was the owner thereof.

## XIII.

That the defendant herein, Fireman's Fund Insurance Company is now, and at all times was, a corporation duly organized under the laws of the State of California; that on or about the 5th day of July, 1945, said Fireman's Fund Insurance Company issued to the defendant E. F. Smith, its policy of fire insurance insuring the defendant E. F. Smith against loss by fire of said building known as the "Atlantic Store", and other buildings on other properties, and said policy is known as No. A-959495.

## XIV.

That an actual controversy has arisen between the defendant E. F. Smith and defendant Jim Dandy Markets, Inc. respecting the rights of said Jim

Dandy Markets, Inc. in and to the proceeds of the policy issued by Fireman's Fund Insurance Company hereinabove [82] described; that Jim Dandy Markets, Inc. contends that it is entitled to the proceeds of any recovery had herein by said E. F. Smith as against said Fireman's Fund Insurance Company.

Wherefore, Jim Dandy Markets, Inc. prays that the rights of Jim Dandy Markets, Inc. and said E. F. Smith to the proceeds of any amounts recovered herein against Fireman's Fund Insurance Company be fixed, determined and adjudicated; that said Jim Dandy Markets, Inc. have judgment for such other and further relief as is just and/or equitable.

/s/ HARRY G. SADICOFF,  
Attorney for Defendant Jim Dandy  
Markets, Inc.

(Verified.)

[Endorsed]: Filed Feb. 10, 1948. [83]

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[Title of District Court and Cause.]

ANSWER OF DEFENDANT E. F. SMITH TO  
CROSS-CLAIM OF DEFENDANT JIM  
DANDY MARKETS, INC.

Comes now defendant E. F. Smith and for answer to the Cross-Claim of defendant Jim Dandy Markets, Inc., says:

I.

Denies that at the time the building known as the

Atlantic Store was totally destroyed by fire on January 14, 1947, or at any other time, the defendant Jim Dandy Markets, Inc., was the owner thereof;

## II.

Denies that the defendant Jim Dandy Markets, Inc., is entitled to the proceeds of any recovery by defendant E. F. Smith [85] from Fireman's Fund Insurance Company;

## III.

Hereby refers to the answer of defendant E. F. Smith and to the Cross-Claim of defendant E. F. Smith against defendant Jim Dandy Markets, Inc., and incorporates each of them herein as a more complete statement of the position of defendant E. F. Smith in answer to the Cross-Claim of defendant Jim Dandy Markets, Inc.

Wherefore defendant E. F. Smith prays that the defendant Jim Dandy Markets, Inc., take nothing by its Cross-Claim and that the same be dismissed and that this defendant have judgment for cost and for such other and further relief as is just and proper.

Dated 11th day of February, 1948.

/s/ CLYDE THOMAS,

/s/ MILAN MEDIGOVICH,

Attorneys for Defendant E. F. Smith.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed Feb. 12, 1948. [86]

In the District Court of the United States, Southern District of California, Central Division

Honorable Leon R. Yankwich, Judge.

No. 6833-Y

CENTRAL MANUFACTURERS' MUTUAL  
INSURANCE COMPANY, et al.,

Plaintiffs,

vs.

JIM DANDY MARKETS, INC., et al.,

Defendants.

### DECISION AND ORDER

The above-entitled cause heretofore tried, argued and submitted, is hereby decided as follows:

#### I.

On the plaintiffs' complaint seeking declaratory relief, the declaration will be for the defendant as follows:

(a) The defendant Jim Dandy Markets, Inc., had an insurable interest in the building which was covered by the policies of fire insurance dated respectively June 19, 1946 and July 19, 1946, under their conditional sales contract for the assignment of the leasehold, dated June 27, 1946 (Defendant's Exhibit 10). [88]

(b) The loss payable under the policies totaling the sum of \$25,000.00 is due from the plaintiffs to the defendant Jim Dandy Markets, Inc., and is not apportionable between the plaintiffs and the defendant Fireman's Fund Insurance Company, under the policy of insurance between the latter company and



the defendant and cross-claimant, E. F. Smith, dated July 5, 1945.

## II.

Under the cross-claim of the defendant E. F. Smith against the defendant Jim Dandy Markets, Inc., a corporation, seeking reformation of that certain assignment of lease, dated June 27, 1946, judgment is ordered in favor of the defendant Jim Dandy Markets, Inc., on the finding that said assignment of lease conveyed to the defendant Jim Dandy Markets, Inc., all the rights, title and interest of E. F. Smith to the leasehold, including all the rights he had to the building thereon, and that there is no showing of mutual mistake in the execution of said assignment.

## III.

Under the cross-claim of the defendant Jim Dandy Markets, Inc., against defendant E. F. Smith, judgment is ordered in favor of the defendant E. F. Smith, that the defendant and cross-claimant Jim Dandy Markets, Inc., is not entitled to any of the proceeds of the insurance policy issued to the defendant E. F. Smith by the defendant Fireman's Fund Insurance Company.

For the guidance of counsel in preparing the findings, the Court states the grounds for its conclusions.

The action being based on diversity of citizenship, the rights of the parties under the policies of insurance [89] and under the assignment of lease are governed by state law (*Angel v. Bullington*, 1947,

330 U.S. 183, 191-192). Under California law, the vendee under conditional sales contracts has an insurable interest, as the sole owner of the property. (Kaufman v. All Persons, 1911, 16 C.A. 388; Kavanaugh v. Franklin Fire Ins. Co., 1921, 185 C. 307, 311-312.) Such title is not, in any way, affected by the fact that the assignment was executory so far as the vendee was concerned and was dependent for full execution upon the performance by it of certain conditions precedent, i.e., the payment of the full purchase price. For this reason, cases like Vierneisel v. Rhode Island Insurance Co., 1946, 77 C.A. 229, do not apply. There, the court was dealing with an outright sale of real property which did not become effective until the deed had actually been delivered. When this is the case, delivery in escrow does not pass title and any loss on the property by fire is payable to the owner who remains until the delivery of the deed, the sole owner of the property. Here the vendee was in possession and all that remained to be done by him was the payment of the price.

It is also clear, both under California and general law of insurance, that insurance contracts between the plaintiffs and the defendant Jim Dandy Markets, Inc. and the insurance contract between the defendant E. F. Smith and the defendant Fireman's Fund Insurance Co. are distinct and separate contracts of insurance and are not governed by any apportionment clause contained in them. Or, to be more exact, that the loss which, under the decision now announced, the plaintiffs must pay to Jim

Dandy Markets, Inc., is not apportionable between the plaintiffs and the Fireman's Fund Insurance Company. (See, *Fireman's Fund etc. v. [90] Palatine Insurance Co.*, 1907, 150 C. 252, 255-256; *Newark Fire Insurance Company v. Turk*, 1925, 3 Cir., 6 F(2) 533; see also, *Insurance Co. of N.A. v. Detroit Security Trust Co.*, 1931, 9 Cir., 51 F(2) 155, 158; *Fidelity etc. Co. v. Fireman's Fund Insurance Co.*, 1940, 38 C.A.(2)1, 5-6; *Hager v. Hanover Fire Ins. Co. of N.Y.*, 1945, D.C. Mo., 64 Fed Sup 948, 952.)

The relief sought by the cross claim is, in like manner, governed by state law. The cross claim charges mutual mistake. Such mistake, to be ground for relief, must be mutual or a mistake of one party which the other at the time knew or suspected. (*California Civil Code*, Secs. 3399-3400-3401; *Auerbach v. Healy*, 1916, 174 C. 60; *Harding v. Robinson*, 1917, 175 C. 534, 541-542; *Burt v. Los Angeles Olive Growers Association*, 1917, 175 C. 668, 675; *National Bank v. Exchange National Bank*, 1921, 186 C. 172, 181; *Coneland Water Co. v. Nickalls*, 1925, 75 C.A. 212, 218-219; *California Trust Co. v. Cohn*, 1932, 214 C. 619, 627; *Goodfellow v. Barritt*, 1933, 130 C.A. 548, 556; *Miller v. Lantz*, 1937, 9 C(2) 544; *California Trust Co. v. Cohn*, 1935, 9 C.A.(2) 33, 40.)

The presumption that a contract expresses the true intention of the parties flows from its voluntary execution. And the burden of showing that it did not conform to such intention rests upon him who seeks to avoid its express terms. See, *Welk v.*

Conner, 1929, 102 C.A. 286, 289; Oakdale Mercantile Co. v. Baer, 1932, 128 C.A. 350, 354; Menning v. Sourisseau, 1933, 128 C.A. 635, 639; California Trust Co. v. Cohn, 1935, 9 C.A.(2) 33, 40.)

Evidence which would warrant reformation must be clear, convincing and "not loose, equivocal or contradictory leaving the mistake open to doubt". (Burt v. Los [91] Angeles Olive Growers Association, *supra*, 675, quoting *Lestrade v. Barth*, 1862, 19 C. 660, 675; and see cases cited under the preceding paragraphs.) The mistake claimed is alleged to have occurred in the instrument denominated "assignment of lease" and dated June 27, 1946. This instrument assigned, sold and transferred to the individuals now composing the Jim Dandy Markets, Inc. "an indenture of lease dated February 1, 1942, between Thomas H. McClenaghan as administrator of the estate of E. T. Williams as lessor and E. F. Smith as lessee."

It is elementary that an assignment of this character carries all the rights, title and interest which the lessee had under the lease which it is sought to assign. (*Bewick v. Mecham*, 1945, 26 C(2) 92, 96.) Unless an exception is specifically contained in the assignment, it carried all the rights of the lessee which he had or which he might exercise. To illustrate: In the case just cited, it was held that such an assignment carried the option to purchase contained in it, although no reference to the fact was contained in the lease. This fact is significant. Because, as I stated during the argument, in all cases of this character, when disputes arise, the



usual claim is that from the failure to refer to a particular right, the inference can be drawn that it was not the intention to cover that right. And so the contention here is made that by the assignment of the lease it was not intended to assign the right which the defendant and cross-claimant Smith had to the building on the premises. It is true that originally the rights of the parties were covered by a sub-lease. But the instrument of June 27, 1946, changed that relationship. It was drawn by the attorney for the defendant and cross-claimant Smith, who testified that he did not discuss the [92] transaction with any of the representatives of the Jim Dandy Markets, Inc., but that he received instructions from Smith's agent to prepare an instrument "assigning" the lease under certain terms. Smith, himself, testified in this court, stating that when casually one of the persons associated with the defendant Jim Dandy Markets, Inc., first broached the subject, he spoke about having the lease "assigned" to them. So we have a situation here where both during the negotiations and in the instruments prepared by the cross claimant's attorney, the parties deliberately used the words "assignment of lease." It follows that they must be charged with having used the words in the sense and meaning which they have in law and that by such use, they intended the full consequence thereof. (See my opinion in *Bowles v. Jung*, 1944, D.C. Cal., 57 Fed. Sup 701, 707-708.) The oral testimony of the cross-complainant Smith and his agent, Johnson, other than as already indicated, amounts to



nothing more than this: That no mention was made as to any rights to the building. The defendant Jim Dandy Markets, Inc., offered no testimony in contradiction. They contented themselves with cross-examining the two persons last named and Mr. Smith's attorney, Mr. Cassidy. The testimony thus elicited does not meet the requirement in such cases. Assuming that Smith actually thought that the building was not included, there is no showing either directly or by inference from the preceding dealings that any of the parties connected with the defendant Jim Dandy Markets, Inc., knew or suspected any mistake as to the import of the assignment or the intention to exclude the rights to the building. To the contrary, the use of the word "assignment" by Mr. Schuster when he first spoke of the matter to Mr. Smith, and the fact that the desire to [93] make "an assignment" was communicated by Mr. Smith's agent to his attorney and that he, in compliance with that instruction, proceeded, in the light of his knowledge of the previous transaction, which he had also handled, to prepare "an assignment" which conveyed whatever rights the cross-claimant Smith had in the lease, show conclusively the absence of any mutual mistake of the type which Section 3399 of the California Civil Code makes the ground for revision of contracts.

This conclusion finds confirmation in the fact that Jim Dandy Markets, Inc., after the execution of the assignment, acted immediately in accordance with the implication of a leasehold assignment by insuring the building and paying for the fire insur-

ance policies which are the basis of this action. Before the assignment the only fire insurance on the building was that carried by Mr. Smith.

Under the circumstances, to revise the contract, as asked by the cross-claimant, would mean the making of a new contract. This a court of equity cannot do.

These considerations lead to the conclusion that, at the time the loss by fire covered by the insurance policies of the plaintiffs occurred, the defendant, Jim Dandy Markets, Inc., was the sole owner of the leasehold interest previously owned by cross-claimant and defendant Smith, including his rights to the building on the premises, the destruction of which by fire resulted in the claim of loss.

Hence the rulings above made.

Counsel for the defendants and respondent will prepare findings under Local Rule 7.

Dated this 15th day of April, 1948.

/s/ LEON R. YANKWICH,  
Judge. [94]

Appearances: For the Plaintiffs: Thomas P. Menzies, Esq., and Harold E. Watt, Esq., Los Angeles, California. For the Defendant Jim Dandy Markets, Inc.: Harry G. Sadicoff, Esq. For the Defendant Fireman's Fund Insurance Co.: Hindman & Davis by E. Eugene Davis, Esq. For the Defendant E. F. Smith: Clyde Thomas, Esq. and Milan Medigovich, Esq. All of Los Angeles, Calif.

[Endorsed]: Filed April 15, 1948. [95]

[Title of District Court and Cause.]

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled cause came on regularly for trial on April 8, 1948, before the Honorable Leon R. Yankwich, Judge of the United States District Court, in the District of Southern California, Central Division, sitting without a jury; said trial was concluded on April 9, 1948. Thomas P. Menzies, Esq. and Harold L. Watt, Esq. appeared as counsel for the plaintiffs; Harry G. Sadicoff appeared as counsel for the defendant Jim Dandy Markets, Inc.; Hindman and Davis, by E. Eugene Davis, Esq. appeared as counsel for the defendant Fireman's Fund Insurance Company; and Clyde Thomas, Esq. and Milan Medigovich, Esq. appeared as counsel for the defendant E. F. Smith.

Oral and documentary evidence was introduced on behalf of both parties, and the Court, having considered the same and [96] the arguments and briefs of counsel filed during the trial, the case was submitted to the Court for its decision, and the Court heretofore, on the 15th day of April, 1948, filed its opinion and decision, indicating specifically the findings to be made with relation to each of the allegations of the Complaint, and the allegations of the Cross-Claims of the defendants, Jim Dandy Markets, Inc., and E. F. Smith. The Court now being fully advised, makes and files the following as its findings of fact:

## FINDINGS OF FACT:

## I.

The jurisdiction of this Court is based on diversity of citizenship.

(a) Plaintiff, Central Manufacturers Mutual Insurance Company is now, and at the time of the filing of the complaint was, a corporation organized and existing under and by virtue of the laws of the State of Ohio, and was and is a citizen of the State of Ohio, and at all times herein mentioned was and now is authorized to do business in the State of California, and to write policies of fire insurance in said State, and was and is actually engaged in the business of writing said policies in said State of California at all times hereinafter mentioned. The principal place of business of said plaintiff is in the State of Ohio.

(b) Plaintiff, Indiana Lumbermens Mutual Insurance Company, is now, and at the time of the filing of the complaint was, a corporation organized and existing under and by virtue of the laws of the State of Indiana, and was and is a citizen of the State of Indiana, and at all times herein mentioned was, and [97] now is, authorized to do business in the State of California, and to write policies of fire insurance in said State, and was and is actually engaged in the business of writing said policies in said State of California at all times hereinafter mentioned. The principal place of business of said plaintiff is in the State of Indiana.

(c) The matter in controversy exceeds, exclusive



of interest and costs, the sum of Three Thousand (\$3,000.00) Dollars.

(d) Defendant E. F. Smith at all times herein mentioned, and at the time of the filing of the Complaint herein, was a citizen and resident of the State of California, residing in the County of Los Angeles, State of California.

(e) Defendant, Jim Dandy Markets, Inc. at the time of the filing of the complaint herein, and at all times herein mentioned, was and is a corporation organized under the laws of the State of California, with its principal place of business in the County of Los Angeles, State of California.

(f) The defendant, Fireman's Fund Insurance Company is a corporation organized and existing under the laws of the State of California, and was and is a citizen of the State of California, and at all times herein mentioned was, and now is, authorized to do business in the State of California, and to write policies of fire insurance in said state, and was and is actually engaged in the business of writing said policies in said State of California at all times hereinafter mentioned. The principal place of business of said defendant is in the City and County of San Francisco, [98] and does business in the County of Los Angeles.

(g) That on or about the 19th day of July, 1946, plaintiff, Central Manufacturers Mutual Insurance Company, issued its standard California fire insurance policy No. F-321452 whereby, for the period from the 19th day of July, 1946, at noon, to the 19th day of July, 1949, at noon, it insured Charles

Schuster, Leo A. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster, co-partners doing business under the fictitious firm name of Jim Dandy Markets, against all loss or damage by fire, except as therein provided, to an amount not exceeding \$12,500.00, the premises described as One Story Composition Roof, Frame D Building at 6801 Atlantic Boulevard in the City of Bell, County of Los Angeles, State of California, including foundations, sidewalks, plumbing, electrical wiring and stationary heating and lighting apparatus and fixtures; also all permanent fixtures, awnings, wall and ceiling decorations and frescoes, stationary scales, machinery and elevators belonging to and constituting a part of said building; that thereafter, by written endorsement made on or about the 8th day of October, 1946 the name of the insured was changed by said plaintiff, Central Manufacturers Mutual Insurance Company, to the defendant, Jim Dandy Markets, Inc.

(h) That on or about the 19th day of July, 1946, plaintiff Indiana Lumbermens Mutual Insurance Company issued its standard California fire insurance policy No. 3170 whereby, for the period from the 19th day of July, 1946, at noon, to the 19th day of July, 1949, at noon, it insured Charles Schuster, Leo A. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster, [99] co-partners doing business under the fictitious firm name of Jim Dandy Markets, against all loss or damage by fire, except as therein provided, to an amount not exceeding \$12,500.00, the premises described as One Story

Composition Roof, D Class building at 6801 Atlantic Boulevard in the City of Bell, County of Los Angeles, State of California, including foundations, sidewalks, plumbing, electrical wiring and stationary heating and lighting apparatus and fixtures; also all permanent fixtures, awnings, wall and ceiling decorations and frescoes, stationary scales, machinery and elevators belonging to and constituting a part of said building; that thereafter, by written endorsement made on or about the 7th day of October, 1946 the name of the insured was changed by said plaintiff, Indiana Lumbermens Mutual Insurance Co., to the defendant, Jim Dandy Markets, Inc.

## II.

On or about the 29th day of September, 1941, Charles E. Kindig and Daisy Kindig, as Lessors, and the defendant E. F. Smith, as Lessee, entered into a Lease upon certain real property in the City of Bell, County of Los Angeles, State of California; that a photostatic copy of said Lease is attached to the Answer of the defendant Jim Dandy Markets, Inc. to the cross-claim of the defendant E. F. Smith, marked Exhibit "A" in said Answer, and by reference is made a part hereof as if herein fully set forth.

## III.

On or about the 1st day of February, 1942, Thomas A. McLenaghan, as Administrator of the Estate of E. T. Williams, Deceased, as Lessor, and the defendant E. F. Smith, as Lessee, entered into

a Lease upon certain real property situated in the City of Bell, County of Los Angeles, State of California; that a [100] photostatic copy of said Lease is attached to the Answer of the defendant Jim Dandy Markets, Inc., to the cross-claim of the defendant E. F. Smith, marked Exhibit "B" in said Answer, and by reference is made a part hereof as if herein fully set forth.

#### IV.

The real property described in said Exhibits "A" and "B" adjoin each other.

#### V.

That there was a building upon said properties known as the "Atlantic Store", and which is the building set forth in the respective policies of fire insurance issued by the plaintiffs herein, as aforesaid, which building was totally destroyed by fire on the 14th day of January, 1947. Said building so known as "Atlantic Store" was situated at 6801 Atlantic Boulevard, City of Bell, County of Los Angeles, State of California.

#### VI.

On the 1st day of July, 1945, the defendant E. F. Smith, as Party of the First Part, and Charles Schuster, Leo A. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster, a co-partnership doing business under the name of Jim Dandy Markets, entered into an Agreement, a copy of which is attached to the Cross-claim of the defendant E. F. Smith, marked Exhibit "A" of said Cross-



claim, and by reference is made a part hereof, as if herein fully set forth.

## VII.

That on the 5th day of July, 1945, the defendant, Fireman's Fund Insurance Company, by its policy in writing in the form provided for it by the Statutes of the State of California, insured the defendant, E. F. Smith for the term of three years against loss by fire to said building, in an amount not exceeding \$16,700; that on or about the said 5th day of July, 1945, the said co-partnership doing business under the name and style of Jim Dandy Markets, Inc., went into possession of said "Atlantic Store". [101]

## VIII.

On or about the 12th day of June, 1946, defendant E. F. Smith, as Party of the First Part, and Charles Schuster, Leo A. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster, a co-partnership doing business under the firm name and style of Jim Dandy Markets, as Parties of the Second Part, entered into a "Supplementary and Modified Agreement"; that a photostatic copy of said "Supplementary and Modified Agreement" is attached to the Answer of the defendant Jim Dandy Markets, Inc., to the Cross-claim of the defendant E. F. Smith, marked Exhibit "C" in said Answer, and by reference is made a part hereof as if herein fully set forth.

## IX.

On or about the 5th day of July, 1945, the said

Jim Dandy Markets, a co-partnership consisting of Charles Schuster, Leo A. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster, went into possession of said building known as the "Atlantic Store", which building is described in the policies of fire insurance issued by the plaintiffs herein; that thereafter, and prior to the destruction of said building by fire on January 14, 1947, said partnership assigned, transferred and conveyed to the defendant Jim Dandy Markets, Inc., all rights that said Jim Dandy Markets, a partnership, had under the Agreement dated July 1, 1945 between E. F. Smith and said Jim Dandy Markets, a partnership, and the Agreement dated June 12, 1946 between said E. F. Smith and said partnership, and under the Assignment executed by the defendant E. F. Smith of the Lease, wherein Charles Kindig and Daisy Kindig are the Lessors aforesaid, and the Lease under which Thomas A. McLenaghan, as administrator of the Estate of E. T. Williams, is the Lessor, as aforesaid; that said Assignment by said E. F. Smith of said Leases is set forth in subdivision (d) of Paragraph IX hereof. [102]

## X.

Concurrently with the execution and delivery of said "Supplementary and Modified Agreement", and in accordance with its terms, covenants and conditions, an escrow was commenced by the defendant E. F. Smith and said partnership known as Jim Dandy Markets, with the Morrison Escrow Company, and escrow instructions and modified escrow instructions were given; that a photostatic

copy of said Escrow Instructions and said Modified Escrow Instructions are attached to the Answer of the defendant Jim Dandy Markets, Inc. to the Cross-claim of the defendant E. F. Smith, marked Exhibit "D" in said Answer, and by reference is made a part hereof as if herein fully set forth; that at the time said Escrow Instructions and Modified Escrow Instructions were delivered to said Morrison Escrow Company, the defendant E. F. Smith delivered to said Morrison Escrow Company each and all of the documents required of him to be delivered under the terms, covenants and conditions of said Supplementary and Modified Agreement and said Escrow Instructions and said Modified Escrow Instructions, including, but not limiting, the following documents, which documents all refer to the said Atlantic Store which was insured by the policies of fire insurance issued by the plaintiffs herein as aforesaid, and which building was destroyed by fire on January 14, 1947:

(a) Lease dated September 29, 1941, between E. F. Smith as Lessee, and Charles E. Kindig and Daisy Kindig as Lessors.

(b) Lease dated February 1, 1942, between E. F. Smith as Lessee, and Thomas A. McLenaghan as Administrator of the Estate of E. T. Williams, Deceased.

(c) Bill of Sale dated June 27, 1946, executed by E. F. Smith in favor of Jim Dandy Markets, a [103] partnership; that a photostatic copy of said

Bill of Sale is attached to the Answer of defendant Jim Dandy Markets, Inc. to Cross-claim of defendant E. F. Smith, marked Exhibit "E", and by reference is made a part hereof as if herein fully set forth.

(d) Assignment of Lease dated June 27, 1946, executed by the defendant E. F. Smith in favor of Charles Schuster, Leo A. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster; that said Assignment is in words and figures as follows, to wit:

#### "ASSIGNMENT OF LEASE"

Know All Men by These Presents: That I, E. F. Smith, of the County of Los Angeles, State of California, for and in consideration of the covenants and agreements set forth in a certain Agreement, dated July 1, 1945, and Supplementary and Modified Agreement, dated June 12, 1946, do hereby sell, assign, transfer and set over unto Charles Schuster, Leo A. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster, a certain indenture and lease dated February 1, 1942 by and between Thomas A. McLenaghan as Administrator of the Estate of E. T. Williams, deceased, and the undersigned, wherein certain land and buildings therein described were demised to the undersigned for a period of five (5) years from August 1, 1942 to Aug. 1, 1947, and that certain indenture and lease dated September 29, 1941 for a term of five (5) years from August 1,



1942 to and including Aug. 1, 1947 at the rental therein stated, together with any rental or extension of said leases which may be secured by the undersigned, subject to the rents, covenants, and conditions [104] contained in said leases, and herein referred to as Atlantic Store—It Being Understood, However, That this assignment shall not become effective until the assignee herein has complied with all of the terms and conditions in any way affecting the property hereby leased, as set forth in the aforementioned supplementary and modified agreement dated June 12, 1946, particularly Section 4 of said Supplementary and Modified Agreement.

“It Is Further Understood that the undersigned has heretofore sub-leased the property described in said leases hereby being assigned, and said sub-lease shall be null and void upon this assignment going into effect. It Is Understood, However, that in the event approval by the lessor is necessary to make this assignment and said approval is not secured, the said sub-lease hereinbefore referred to shall remain in effect during the life of the Agreement and the Supplementary and Modified Agreement.

It Is Further Understood and Agreed by and between the parties hereto, that the assignor hereby agrees that the assignees, may, without obtaining the consent or permission of said assignor, sub-lease the whole or any part of the property herein leased, or assign the leases pertaining to such market site,

provided permission is necessary and secured by the undersigned to make this assignment.

In Witness Whereof, I have hereunto subscribed my name this 27th day of June, 1946.

/s/ E. F. SMITH. [105]

We, the undersigned have read the foregoing assignment and hereby accept the same and agree to conform with all of the terms and conditions required in the Leases and the Agreements referred to in this assignment.

Dated June 27, 1946.

/s/ CHARLES SCHUSTER,

/s/ LEO A. GOLDBERG,

/s/ EARL I. SWETOW,

/s/ MAX M. BERICK,

/s/ NORMAN SCHUSTER.

## XI.

That at the time said building known as the "Atlantic Store" was totally destroyed by fire on January 14, 1947, all payments required to be made under the provisions of said Supplementary and Modified Agreement, and under the Escrow Instructions and Modified Escrow Instructions had been made, and that all amounts due under said Supplementary and Modified Agreement and said Escrow Instructions and Modified Escrow Instructions as relating to said "Atlantic Store", was fully and completely paid to the defendant E. F. Smith by the defendant Jim Dandy Markets, Inc. on or

about the 19th day of March, 1947, and that no amount due or to become due to said E. F. Smith under said Supplementary and Modified Agreement, or said Escrow Instructions or Modified Escrow Instructions, is unpaid; that on or about the 30th day of July, 1947, defendant E. F. Smith was paid in full the sum of \$225,000.00 required to be paid to him under said Supplementary and Modified Agreement and under said Escrow Instructions and Modified Escrow Instructions, and immediately after the amounts required to be paid as relating to said "Atlantic Store" had been paid, Morrison Escrow Company delivered to the defendant Jim Dandy Markets, Inc. the following documents:

(a) Lease dated September 29, 1941, between E. F. Smith as Lessee and Charles E. Kindig and Daisy Kindig as Lessors (photostatic [106] copy of which is attached to the answer of the defendant Jim Dandy Markets, Inc., with a cross-claim of the defendant, E. F. Smith, and marked Exhibit "A").

(b) Lease dated February 1, 1942, between E. F. Smith as Lessee and Thomas A. McLenaghan, as Administrator of the Estate of E. T. Williams, deceased (photostatic copy of which is attached to the answer of the defendant Jim Dandy Markets, Inc., with a cross-claim of the defendant, E. F. Smith, and marked Exhibit "B").

(c) Bill of Sale dated June 27, 1946, executed by E. F. Smith in favor of Jim Dandy Markets, a partnership (photostatic copy of which is attached to the answer of the defendant Jim Dandy Markets,

Inc., with a cross-claim of the defendant, E. F. Smith, and marked Exhibit "E").

(d) Assignment of Lease dated June 27, 1946, which is set forth in subdivision (d) paragraph "X" above.

## XII.

That each and both of the policies of insurance issued by the plaintiffs herein expressly provided that it was understood and agreed that the property insured stood on leased ground and that at the time the building known as the "Atlantic Store" and described in the policies of fire insurance issued by the plaintiffs herein respectively, was destroyed by fire on January 14, 1947, the defendant, Jim Dandy Markets Inc., the named insured under the policies issued by the plaintiffs herein respectively, was in possession of said building, and said defendant, Jim Dandy Markets Inc., was the [107] sole and unconditional owner of said building so destroyed by fire.

## XIII.

That on the 5th day of July, 1945, the defendant Fireman's Fund Insurance Company issued to the defendant E. F. Smith, its policy of fire insurance insuring the defendant E. F. Smith against loss by fire of said building known as the "Atlantic Store" and other buildings on other properties, and said policy so issued by said Fireman's Fund Insurance Company, being No. A-959495.

## XIV.

That following the destruction of said building known as the "Atlantic Store", the defendant Jim



Dandy Markets, Inc., within the time required by the respective policies of fire insurance issued by the respective plaintiffs herein, or any extensions thereof, performed all of the conditions on its part required to be performed under the terms of said policies of fire insurance so issued by the plaintiffs herein, and on or about the 9th day of April, 1947, plaintiffs herein and said Jim Dandy Markets, Inc. agreed, in writing, that the sound cash value of said building so destroyed by fire, and immediately preceding its destruction by fire, was the sum of \$32,476.92, no part of which has been paid by the plaintiffs herein to said Jim Dandy Markets, Inc., and each of the plaintiffs herein have, since the 9th day of April, 1947, failed, neglected and refused to pay to the defendant Jim Dandy Markets, Inc., any amount on account of said loss.

## XV.

That each and all of the policies of insurance referred to herein were in the form prescribed by the laws of the State of California, and contained the following provisions:

“This company shall not be liable under this policy for a greater portion of any loss on the described policy, or for loss by, and expenses of, removal from premises endangered [108] by fire, than the amount hereby insured bears to the entire insurance covering such property, whether valid or not or by solvent or insolvent insurers.”

## XVI.

The Court finds that the defendant, E. F. Smith was the sole owner of said building located at 6801 Atlantic Boulevard, Bell, California, on July 5, 1945, and up to and including June 27, 1946, and further finds that on said June 27, 1946, said defendant, E. F. Smith sold, assigned and transferred to the predecessors in interest of the defendant, Jim Dandy Markets, Inc., all of his right, title and interest in said building, and that at no time subsequent to said June 27, 1946, did the said E. F. Smith have any interest in said building other than a lien for the payment of the balance of the purchase price thereof, and at the time of the fire on January 14, 1947, the defendant, E. F. Smith was not the owner of said building, and had, on said January 27, 1946, changed his interest, title and possession in and to said building.

## XVII.

The Court further finds that in accordance with the agreement entered into between the defendant, E. F. Smith and the predecessors of the defendant, Jim Dandy Markets, Inc., on June 27, 1946, and by the terms thereof and by the assignment of lease set forth in paragraph "X", subdivision (d) above, the defendant, E. F. Smith sold, assigned and transferred to the predecessors in interest of the defendant, Jim Dandy Markets, Inc., all right, title and interest in and to the building referred to herein, and that there was no other or different agreement between said parties than as evidenced by said written assignment and that said written assignment

embodied the entire agreement between the parties thereto. The Court further finds that the written agreement entered into between the defendant, E. F. Smith and the predecessors in interest of the defendant, [109] Jim Dandy Markets, Inc., consisting of Exhibits "7", "8", "9" and "10" filed herein constituted the entire agreements between said parties, and that said agreements correctly expressed the intention of the parties thereto, and that there was no mistake, either mutual or otherwise, in the drafting of said agreements, including said assignment which intended to and were effective in conveying from the defendant, E. F. Smith to the predecessors in interest of the defendant, Jim Dandy Markets, Inc., all the right, title and interest of said defendant, E. F. Smith in and to said building known as 6801 Atlantic Boulevard, Bell, California, subject only to the right of said defendant, E. F. Smith to receive payment as in said agreements provided.

### XVIII.

The Court further finds that the policies of fire insurance issued by the plaintiffs herein insured only the defendant Jim Dandy Markets, Inc., and the policy of fire insurance issued by the defendant, Firemans Fund Insurance Company insured only the interest of the defendant, E. F. Smith, and that said insurance of the plaintiffs on one hand and the defendants, Firemans Fund Insurance Company on the other, were to different parties and upon different subjects of interest. That the insur-

ance of the defendant, Jim Dandy Markets, Inc., from the plaintiffs is not affected by the policy of fire insurance issued by the defendant Firemans Fund Insurance Company or diminished by apportionment thereof.

### XIX.

That it is true that the defendant, Jim Dandy Markets, Inc., has at all times claimed that by virtue of the assignment set forth in subdivision (d) of paragraph "X" herein, the building known as the "Atlantic Store" and described in the policies of fire insurance issued by the respective plaintiffs herein, was conveyed to and was the property of said Jim Dandy Markets, Inc., but it was not true that during the negotiations and the discussions between the defendant, E. F. Smith and the predecessors in interest of the defendant, [110] Jim Dandy Markets, Inc., or their brokers or agents, the building was not considered as a subject of the proposed sale by said E. F. Smith to the predecessors in interest of the defendant, Jim Dandy Markets, Inc.; and it is not true that the value of said building was in no wise considered as an element of the sales price agreed upon; and it is not true that said assignment set forth in subdivision (d) of paragraph "X" herein does not correctly contain the agreement between the defendant, E. F. Smith and the predecessors in interest of the defendant, Jim Dandy Markets, Inc.; and it is not true that the defendant, E. F. Smith did not intend to convey said building to the predecessors in interest of the defendant, Jim Dandy Markets, Inc.; and the Court



finds that said defendant, E. F. Smith did intend to convey said building by said assignment to the predecessors in interest of the defendant, Jim Dandy Markets, Inc.; and the Court finds that said defendant, E. F. Smith did intend to convey said building by said assignment to the predecessors in interest of the defendant, Jim Dandy Markets, Inc.; and the Court finds that said defendant, E. F. Smith at the time he executed said assignment described in subdivision (d), of paragraph "X" herein intended to convey and did convey to the predecessors in interest of the defendant, Jim Dandy Markets, Inc., all of his right, title and interest in and to the building known as "Atlantic Store."

XX.

That it is true that at the time said building was destroyed by fire on January 14, 1947, Jim Dandy Markets, Inc., was the sole and unconditional owner of the leasehold interest previously owned by the defendant E. F. Smith, including his rights to the building on the said premises; that it is not true that said assignment set forth in subdivision (d) of paragraph "X" was executed by the defendant E. F. Smith under the mistaken belief that the building so destroyed by fire was not conveyed by said assignment to the predecessor in interest of the defendant Jim Dandy Markets, Inc., [111] and it is not true that said assignment does not truly express the intention of the parties to said assignment. On the contrary, the Court finds that said assignment does truly express the intention of the parties thereto.

By reason of the foregoing facts, the Court now finds the following as its conclusions of law:

### CONCLUSIONS OF LAW

1. That it be declared that the defendant, Jim Dandy Markets, Inc., was the sole and unconditional owner of the building herein described and which was destroyed by fire, in contemplation of the terms and conditions of the policies of insurance executed and delivered by the plaintiffs herein and in which policies of insurance the defendant, Jim Dandy Markets, Inc., at the time of the fire, was named as the insured, and said building was insured against loss by fire by said plaintiffs in an amount not exceeding \$12,500 by each plaintiff, and the defendant, Jim Dandy Markets, Inc., is entitled to judgment against each plaintiff in the sum of \$12,500 with interest thereon at the rate of seven (7%) per cent per annum from the 9th day of May, 1947 (30 days after adjuster's agreement) until paid, and its costs herein.

2. That it be further declared that any loss to defendant, Jim Dandy Markets, Inc., by reason of said fire is not apportionable between the plaintiffs and the defendant Firemans Fund Insurance Company under the policy of insurance between said Firemans Fund Insurance Company and the defendant, E. F. Smith.

3. That it be further declared that under the cross-claim of the defendant, E. F. Smith against the defendant, Jim Dandy Markets, Inc., the assignment dated June 27, 1946, referred to in the

Findings conveyed to Charles Schuster, Leo A. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster, the predecessors in interest of Jim Dandy Markets, Inc., all the right, title and interest of said E. F. Smith to the leasehold described in said assignment, including [112] all the right that he had to the building destroyed by fire, and that there was and is no showing of mutual mistake or any mistake in the execution of said assignment.

4. That it be further declared that the defendant, Jim Dandy Markets, Inc., is not entitled to the proceeds, if any, of the insurance policy issued to the defendant, E. F. Smith, by the defendant Firemans Fund Insurance Company.

5. That it be further declared that the defendant, Firemans Fund Insurance Company is entitled to go hence and have and recover of plaintiffs its costs and disbursements herein.

Judgment is ordered entered accordingly.

Done in open Court this 18th day of May, 1948.

/s/ LEON R. YANKWICH,  
United States District Judge.

(Acknowledgments of Service attached.)

(Duly Verified.)

[Endorsed]: Filed May 18, 1948. [113]

In the United States District Court, Southern  
District of California, Central Division

No. 6838—Y.

CENTRAL MANUFACTURERS' MUTUAL INSURANCE COMPANY, a corporation, INDIANA LUMBERMENS MUTUAL INSURANCE COMPANY, a corporation,

Plaintiffs,

vs.

JIM DANDY MARKETS, INC., a corporation, FIREMAN'S FUND INSURANCE COMPANY, a corporation, and E. F. SMITH,

Defendants.

### JUDGMENT

The above entitled cause came on regularly for trial on April 8, 1948, before the Honorable Leon R. Yankwich, Judge of the United States District Court, in the Southern District of California, Central Division, sitting without a jury; said trial was concluded on April 9, 1948.

Thomas P. Menzies, Esq., and Harold L. Watt, Esq., appeared as counsel for the plaintiffs; Harry G. Sadicoff, Esq., appeared as counsel for the defendant, Jim Dandy Markets, Inc.; Hindman and Davis by E. Eugene Davis, Esq., appeared as counsel for the defendant, Fireman's Fund Insurance Company; and Clyde Thomas, Esq., and Milan Medigovich, Esq., appeared as counsel for defendant, E. F. Smith.

Oral and documentary evidence was introduced on



behalf of all the parties, and the Court having considered same and the arguments and briefs of counsel filed during the trial, the cause was [116] submitted to the Court for its decision.

The Court heretofore, on the 15th day of April, 1948, filed its opinion and decision indicating specifically the findings to be made with relation to each of the allegations of the complaint and the allegations of the cross-claims of the defendants, Jim Dandy Markets, Inc., and E. F. Smith. And the Court now being fully advised and having made and filed its Findings of Fact and Conclusions of Law, It Is Ordered, Adjudged and Decreed:

(1) That the defendant, Jim Dandy Markets, Inc., was the sole and unconditional owner of the building known as the Atlantic Store and situated at 6801 Atlantic Boulevard, in the City of Bell, County of Los Angeles, State of California, and which was destroyed by fire, in contemplation of the terms and conditions of the policies executed and delivered by the plaintiffs herein, and in which policies of insurance the defendant, Jim Dandy Markets, Inc., at the time of the destruction of said building by fire was named as the insured, and the said building was insured against loss by fire by each of the plaintiffs in an amount not exceeding \$12,500.

(2) That the defendant, Jim Dandy Markets, Inc., have and recover from the plaintiff, Central Manufacturers' Mutual Insurance Company, a corporation, the sum of \$12,500, with interest thereon at the rate of seven (7%) per cent per annum from

the 9th day of May, 1947, until paid, and its costs herein.

(3) That the defendant, Jim Dandy Markets, Inc., have and recover from the plaintiff, Indiana Lumbermens Mutual Insurance Company, a corporation, the sum of \$12,500, with interest thereon at the rate of seven (7%) per cent per annum from the 9th day of May, 1947, until paid, and its costs herein.

(4) That any loss to the defendant, Jim Dandy Markets, Inc., by reason of the destruction of said building by fire is not apportionable between the plaintiffs and the defendant, Firemans Fund [117] Insurance Company under the policy of insurance between Firemans Fund Insurance Company and the defendant, E. F. Smith.

(5) That the assignment of lease dated June 27, 1946, and executed by the defendant, E. F. Smith, in favor of Charles Schuster, Leo A. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster, co-partners doing business under the name of Jim Dandy Markets, the predecessors in interest of the defendant, Jim Dandy Markets, Inc., conveyed to the said predecessors in interest of said Jim Dandy Markets, Inc., all right, title and interest of said defendant, E. F. Smith to the leaseholds described in said assignment, including all the right that said defendant, E. F. Smith, had to the building destroyed by fire, and there was and is no showing of mutual mistake or any mistake in the execution of said assignment.

(6) That the defendant, Jim Dandy Markets,

Inc., is not entitled to the proceeds, if any, of the insurance policy issued to the defendant, E. F. Smith, by the defendant, Firemans Fund Insurance Company.

(7) That the defendant, Firemans Fund Insurance Company is entitled to go hence and have and recover of plaintiff its costs and disbursements herein.

Done in open Court this 18th day of May, 1948.

/s/ LEON R. YANKWICH,  
United States District Judge.

(Acknowledgments of Service attached.)

(Duly Verified.)

[Endorsed]: Filed May 18, 1948. [118]

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[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT  
OF APPEALS

Notice Is Hereby Given that E. F. Smith, defendant above named hereby appeals to the Circuit Court of Appeals for the 9th Circuit from a final judgment entered in this action on May 18, 1948.

Dated this 14th day of May, 1948.

/s/ CLYDE THOMAS,  
/s/ MILAN MEDIGOVICH,  
Attorneys for Appellant E. F. Smith.

[Endorsed]: Filed June 15, 1948. [121]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD  
ON APPEAL

Appellant E. F. Smith hereby designates the portions of the record proceedings and evidence to be contained in the record on appeal as follows:

1. Complaint.
2. Answer of Fireman's Fund Insurance Company.
3. Answer of defendant Jim Dandy Markets, Inc.
4. Answer of E. F. Smith together with Smith's Exhibits A and B attached thereto.
5. Cross-claim of defendant E. F. Smith against defendant Jim Dandy Markets, Inc., together with Smith's Exhibit C attached thereto. [122]
6. Answer of defendant Jim Dandy Markets, Inc., to Cross-claim of defendant E. F. Smith together with Jim Dandy Exhibits A, B, D, and E. Jim Dandy Exhibits C and F are omitted as they are the same documents as Smith's Exhibits B and C, respectively.
7. Cross-claim of defendant Jim Dandy Markets, Inc., against E. F. Smith.
8. Answer of defendant E. F. Smith to Cross-claim of defendant Jim Dandy Markets, Inc.
9. Decision and Order.
10. Findings of Fact and Conclusions of Law.
11. Judgment.
12. Plaintiff's Exhibit No. 1 in evidence, Pre-Trial Transcript.



13. Plaintiff's Exhibit No. 2 in evidence, Central Manufacturer's Insurance Policy.

14. Plaintiff's Exhibit No. 3 in evidence, Indiana Lumbermen's Insurance Policy.

15. Plaintiff's Exhibit No. 4 in evidence, Fireman's Fund Policy to Smith.

16. Plaintiff's Exhibit No. 5 in evidence, Lease—Kindig to Smith. Do not copy as this is Exhibit A, Jim Dandy Markets, Inc., Answer to Cross-Claim.

17. Plaintiff's Exhibit No. 6 in evidence, Lease—McLenaghan to Smith. Do not copy as this is Exhibit B, Jim Dandy Markets, Inc., Answer to Cross-Claim.

18. Plaintiff's Exhibit No. 7 in evidence, Supplementary and Modified Agreement. Do not copy as this is Exhibit B, Answer of E. F. Smith.

19. Plaintiff's Exhibit No. 8 in evidence, Escrow Instructions. Do not copy as this is Exhibit D, Answer of Jim Dandy Markets to Cross-Claim of defendant E. F. Smith. [123]

20. Plaintiff's Exhibit No. 9 in evidence, Bill of Sale. Do not copy as this is Exhibit E, Answer Jim Dandy Markets, Inc., to Cross-Claim of E. F. Smith.

21. Plaintiff's Exhibit No. 10 in evidence, Assignment of Lease. Do not copy as this is Exhibit C, Cross-Claim of E. F. Smith against Jim Dandy Markets, Inc.

22. Plaintiff's Exhibit No. 11 in evidence, Adjustment Agreement.

23. Plaintiff's Exhibit No. 12 in evidence, Letter,

Jim Dandy Markets, Inc., to Morrison Escrow Company, dated March 20, 1947.

24. Plaintiff's Exhibit No. 13 in evidence, Agreement. Do not copy as this is Exhibit A, Answer defendant E. F. Smith.

25. Defendant Smith's Exhibit A in evidence, Sub-Lease, E. F. Smith to Jim Dandy Markets, a partnership.

26. Defendant Smith's Exhibit B in evidence, Inventory of all Fixtures, Equipment, and Machinery.

27. Transcript of all Oral Proceedings and Testimony.

MILAN MEDIGOVICH and  
CLYDE THOMAS,

Attorneys for Appellant,  
E. F. Smith.

By /s/ CLYDE THOMAS.

(Acknowledgment of Service by Mail attached.)

[Endorsed]: Filed June 15, 1948. [124]

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice Is Hereby Given that Central Manufacturers' Mutual Insurance Company and Indiana Lumbermens Mutual Insurance Company, plaintiffs above named, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment given and made in the

above entitled action in favor of the defendant Jim Dandy Markets, Inc., and against the plaintiffs, Central Manufacturers' Mutual Insurance Company and Indiana Lumbermens Mutual Insurance Company, and entered on the 18th day [126] of May, 1948, in Civil Order Book No. 50, at Page 717, and from the whole and every part of said judgment.

Dated this 15th day of June, 1948.

THOMAS P. MENZIES and  
HAROLD L. WATT,

By /s/ HAROLD L. WATT,  
Attorneys for Plaintiffs, Central Manufacturers'  
Mutual Insurance Company, a Corporation, and  
Indiana Lumbermens Mutual Insurance Com-  
pany, a Corporation.

[Endorsed]: Filed June 16, 1948. [127]

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[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH AP-  
PELLANTS INTEND TO RELY ON  
THE APPEAL

Appellants, Central Manufacturers' Mutual Insurance Company and Indiana Lumbermens Mutual Insurance Company, pursuant to Rule 75, Subsection (d), Rules Civil Procedure, make the following statement of points upon which they intend to rely on this appeal:

1. The Court's finding of fact that at the time the building known as the "Atlantic Store," de-

scribed in the policies of fire insurance issued by the plaintiffs herein respectively, was destroyed by fire on January 14, [128] 1947, the defendant Jim Dandy Markets, Inc., was the sole and unconditional owner of said building so destroyed by fire is contrary to the evidence.

2. The Court's finding of fact that the insurance of the defendant Jim Dandy Markets, Inc., from the plaintiffs is not affected by the policy of fire insurance issued by the defendant Indiana Lumbermens Mutual Insurance Company, or diminished by apportionment thereof, is contrary to the evidence.

3. The Court's finding of fact that the defendant E. F. Smith was not the owner of said building on January 14th, 1947, is contrary to the evidence.

4. The evidence shows that the defendant E. F. Smith had, on January 14th, 1947, an insurable interest in the premises covered by the plaintiffs' fire insurance policies because the bill of sale and assignment of the leases had not been delivered to the Jim Dandy Markets through escrow, and because upon the assignment of the leases by E. F. Smith, he continued to be liable as guarantor for the performance of the covenants of the leases, including the payment of rent.

5. The evidence shows that the defendant Jim Dandy Markets, Inc., was entitled upon payment of the balance of the purchase price, to the benefit of the insurance collectible by defendant E. F. Smith, as vendee.

6. The evidence shows that upon liability for the loss from fire accruing to the plaintiffs, Central



Manufacturers' Insurance Company and Indiana Lumbermans Mutual Insurance Company, as insurers of defendant Jim Dandy Markets, Inc., under the sales contract with defendant E. F. Smith, said plaintiffs were entitled [129] by subrogation to have the benefit of the insurance carried by defendant E. F. Smith on said premises, thus reducing the loss to the Jim Dandy Markets, Inc., for which the plaintiffs were liable.

THOMAS P. MENZIES and  
HAROLD L. WATT,

By HAROLD L. WATT,

Attorneys for Appellants, Central Manufacturers'  
Mutual Insurance Company and Indiana Lum-  
bermens Mutual Insurance Company.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed June 24, 1948. [130]

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[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD  
ON APPEAL

Appellants, Central Manufacturers' Mutual Insurance Company and Indiana Lumbermens Mutual Insurance Company, pursuant to Rule 75, Subsections (a) and (k), Rules Civil Procedure, adopt as their designation of the portions of the record, proceedings, and evidence to be contained in the record

on appeal, the designation of contents of record on appeal heretofore filed by appellant E. F. Smith.

THOMAS P. MENZIES and  
HAROLD L. WATT,

By HAROLD L. WATT,  
Attorneys for Appellants, Central Manufacturers'  
Insurance Company and Indiana Lumbermens  
Mutual Insurance Company.

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed June 24, 1948. [133]

PLAINTIFFS' EXHIBIT NO. 1

In the District Court of the United States in and  
for the Southern District of California, Central  
Division.

Honorable Peirson M. Hall, Judge presiding.

No. 6838-PH—Civil

CENTRAL MANUFACTURERS' MUTUAL  
INSURANCE COMPANY, a Corporation,  
INDIANA LUMBERMENS MUTUAL  
INSURANCE COMPANY, a Corporation,  
Plaintiffs,

vs.

JIM DANDY MARKETS, INCORPORATED,  
a Corporation,  
FIREMAN'S FUND INSURANCE COMPANY,  
a Corporation,  
E. F. SMITH,  
Defendants.

REPORTER'S TRANSCRIPT OF PRETRIAL  
HEARING

Los Angeles, California

November 17, 1947

Appearances: For the Plaintiffs: Thomas P.  
Menziez, Esq., 548 South Spring Street, Los Angeles  
13, California. [137] For the Defendant Jim Dandy  
Markets, Incorporated: Harry G. Sadicoff, Esq.,  
727 West Seventh Street, Los Angeles 14, Califor-  
nia. For the Defendant Fireman's Fund Insurance  
Company: Hindman & Davis, 607 South Hill Street,  
Los Angeles 14, California; by E. Eugene Davis,

## Plaintiffs' Exhibit No. 1—(Continued)

Esq. For the Defendant E. F. Smith: Clyde Thomas, Esq., 411 West Fifth Street, Los Angeles 13, California. [138]

(In chambers.)

The Court: Is there a stipulation in this matter?

Mr. Menzies: We were willing to stipulate, as I called the Court's attention to on the last proceedings in open court a week ago. The stipulation was prepared by Mr. Sadicoff, as he indicated he would do, and submitted it to the rest of us. I have proposed certain amendments thereto, and I believe Mr. Thomas proposed some amendment, and when those proposed amendments were submitted, as Mr. Sadicoff indicated, if we agreed to those facts he would be out of court.

Mr. Sadicoff: I don't think that Mr. Thomas submitted any.

Mr. Thomas: No, I didn't.

Mr. Menzies: I submitted the amendment along this line, that none of the acts or declarations that occurred between the owner, Mr. Smith, and the Jim Dandy Markets, in so far as their contractual negotiations are concerned, were done with either the knowledge or consent of the plaintiff, and that seemed to stop the proceedings right there.

However, since that time Mr. Thomas has filed a cross bill against the Jim Dandy Markets and the Jim Dandy Markets have filed an answer thereto. It now develops that apparently [139] there was at most an option to purchase, at least that is the construction that I placed upon the documents that are



Plaintiffs' Exhibit No. 1—(Continued)

in the file, and I believe the Court will if it looks at the answer of the Jim Dandy Markets to the cross bill. There are a number of exhibits attached to it which seems to indicate that.

Now if that is the case we don't dispute those facts. I believe that the matter will be in shape for a motion for summary judgment so far as the plaintiffs are concerned.

You will note that the contract that was drawn up—you may call it whatever you please—apparently only grants to the Jim Dandy Markets the option to purchase upon the fulfillment of the terms and conditions of that contract.

There are a number of interesting features that appear in that contract with relation to its terms and conditions. The first will be found on page 1 of the photostatic copy of the contract, in paragraph 1, wherein they merely agree to sell to the party of the second part, agree to purchase, all of the fixtures, machinery and equipment contained, located and contained, in all of the markets referred to in the agreement for the sum of \$225,000. There was payment in good faith so far as the option is concerned, and that is to—

The Court: Suppose we do not discuss the merits now. There isn't anything that can be done in a pretrial conference [140] and anything that can be done on the motion for summary judgment, why do you not submit a motion to try it?

Mr. Menzies: I think this should be done here at the pretrial conference, your Honor. We should

## Plaintiffs' Exhibit No. 1—(Continued)

agree to certain facts that I think there is no dispute about as between all of the interested parties, and if counsel would be willing to stipulate that the fire occurred on the morning of January 14, 1947, that the alarm was turned in at 3:04 a.m., that the fire department got there at 3:10; that 14 minutes before the fire occurred the radio car passed the place of business that burned and the lights were out, that immediately prior to the fire an explosion was heard by neighbors—there was a night watchman there at the fire, I believe his name was Smith, I don't recall—and that at the time of the fire he was in the premises, went out and discovered the fire in the rear portion of the building; that he went to a telephone two blocks away and phoned in an alarm, although there were several phones in the place—that is, pay phones—that along about 2:15 in the morning—

The Court: What is the materiality that he went to the phone two blocks away?

Mr. Sadicoff: Can't we stipulate that there was a fire on January 14th? What is the necessity for all of this detail?

Mr. Menzies: I think we ought to have all the facts and [141] circumstances surrounding the cause and the origin of that fire, if any.

The Court: Is there some issue in connection with it?

Mr. Menzies: Only as to the occurrence of the fire, your Honor.

The Court: As to what caused it?

Plaintiffs' Exhibit No. 1—(Continued)

Mr. Menzies: I don't think anybody knows what caused it.

The Court: Is there any issue as to what caused it?

Mr. Menzies: No, we didn't raise that.

The Court: Why is it material then?

Mr. Sadicoff: You don't contend it was of incendiary origin and that we originated it, do you?

Mr. Menzies: No, I can't prove that.

Mr. Sadicoff: I don't see the necessity of it then.

Mr. Davis: What is the object of it? This is something new to me.

Mr. Menzies: It is merely circumstances surrounding the fire, that it did occur in that manner.

Mr. Davis: That is all I had ever heard, that it was a fire.

Mr. Sadicoff: That is all I heard.

Mr. Menzies: And these various documents—

The Court: In other words, you all stipulate that on this date, January 14, 1947, in the morning, the building was destroyed by fire? [142]

Mr. Menzies: That is right.

The Court: Of unknown origin?

Mr. Menzies: That is right. That is satisfactory.

The Court: Is that agreed to?

Mr. Thomas: Yes.

Why not put in the value, as far as the value of the building goes?

The Court: Let us just get one thing at a time.

That is agreed to. What is next?

## Plaintiffs' Exhibit No. 1—(Continued)

Mr. Menzies: That there were two policies of insurance issued by the plaintiffs, each in the sum of \$12,500, that the named assured in those policies was the Jim Dandy Markets, Inc. At the time of the fire, that without knowledge or consent of the parties the various documents, that is, the agreement or option to purchase, and the supplemental agreements that resulted from that original agreement, and the escrow and instructions were executed by the defendant Jim Dandy Markets and E. F. Smith without the knowledge or consent of the plaintiffs.

The Court: Is that agreed to?

Mr. Sadicoff: No, sir.

Mr. Davis: Mr. Menzies, I don't want to interrupt you, but I went through the stipulation that Mr. Sadicoff prepared. Have you any objection to any of it?

Mr. Menzies: Yes, I prepared some amendments. [143]

Mr. Davis: You prepared some supplementary matters, but so far as he had prepared it in his stipulation—I understood you okayed it, Mr. Thomas.

Mr. Thomas: Not as to the facts subsequent to the fire. I objected to that. That is why I hadn't written in.

Mr. Davis: But beyond that?

Mr. Menzies: I haven't any objection to it.

Mr. Davis: I am thinking that what you are



Plaintiffs' Exhibit No. 1—(Continued)

talking about are written instruments, these parties entered into written instruments, something that you and I have nothing to do with. We didn't engage in that.

Mr. Menzies: That is correct. But Mr. Sadicoff said that he will not agree to that.

The Court: He will not agree to what?

Mr. Menzies: That we had no knowledge of any of the facts or circumstances.

The Court: Well, before we get to that, let us take the other matter up. It is stipulated that these agreements—are they all set up in the pleadings?

Mr. Sadicoff: Every document is set up in the answer of the defendant Jim Dandy Markets as to the cross-claim of E. F. Smith, excepting the two insurance policies issued by the plaintiffs in this action, and Mr. Menzies and I have this day agreed, and I have exhibited to him, the two policies and he has to me, that those policies are true and correct. [144]

The Court: Are they set forth here?

Mr. Sadicoff: No, sir. I can furnish photostatic copies of them.

The Court: Does the answer of Jim Dandy Markets contain as exhibits all of the documents that are material to this case and that were executed between—

Mr. Sadicoff: Smith and Jim Dandy Markets; yes.

The Court: Some were executed by others?

Mr. Sadicoff: Yes.

## Plaintiffs' Exhibit No. 1—(Continued)

The Court: Here is the lease of Charles E. Kingdig. Let us take that. It is stipulated that the lease attached as Exhibit A to the answer of Jim Dandy Markets to the cross-claim and defendant was executed on or about the date it bears by the parties purporting to execute it?

Mr. Thomas: Yes.

Mr. Davis: Yes.

Mr. Menzies: I will so stipulate.

Mr. Davis: Executed and delivered.

Mr. Sadicoff: Yes, sir.

The Court: Executed and delivered?

Mr. Menzies: Yes, sir.

The Court: Exhibit B appears to be a letter addressed to E. F. Smith, dated February 1, 1942.

Mr. Sadicoff: That is part of the exhibit that follows.

The Court: That Exhibit B, consists of that letter of [145] February 1, 1942 and another lease executed by the parties purporting to execute it on or about the date it bears, and delivered?

Mr. Thomas: Yes.

Mr. Davis: Yes.

Mr. Menzies: So stipulated.

Mr. Sadicoff: And referred to in the answer of Jim Dandy Markets as Exhibit B.

The Court: Exhibit C attached to that answer just described, supplementary and modified agreement, between E. F. Smith, Charles Schuster and others, was executed on or about the date it bears by the parties who purport to have executed it?

Plaintiffs' Exhibit No. 1—(Continued)

Mr. Menzies: So stipulated.

Mr. Sadicoff: So stipulated.

Mr. Davis: Yes.

Mr. Thomas: Yes.

The Court: And Exhibit D, escrow instructions attached to the answer as Exhibit D, were executed on or about the date they bear by the parties purporting to execute it? That is, Jim Dandy Markets by Charles Schuster, by Leo Goldberg and by E. F. Smith and delivered to the escrow holder. Is that stipulated to?

Mr. Thomas: Yes.

Mr. Davis: Yes. [146]

Mr. Menzies: So stipulated.

Mr. Sadicoff: Yes, so stipulated.

The Court: And that Exhibit E, a bill of sale attached to the complaint as Exhibit E, was executed on or about the date it bears by the party purporting to have executed it and delivered to the escrow holder?

Mr. Menzies: So stipulated.

Mr. Sadicoff: Yes.

Mr. Davis: Yes.

Mr. Thomas: So stipulated.

The Court: Likewise the assignment of lease, Exhibit F, executed on or about the date it bears and by the parties purporting to execute it, and delivered to the escrow holders?

Mr. Thomas: Yes.

Mr. Menzies: So stipulated.

## Plaintiffs' Exhibit No. 1—(Continued)

Mr. Sadicoff: Yes.

Mr. Davis: Yes.

The Court: Were these delivered to the escrow holders?

Mr. Menzies: That is something I don't know.

Mr. Thomas: That was part of the stipulation in each instance.

The Court: On or about the date it bears.

Mr. Menzies: Is that the correct date or is that merely the date the instrument was executed?

Mr. Thomas: I don't think there is any variable that is [147] significant there. It may have been the next day.

Mr. Menzies: On or about the date.

Mr. Thomas: On or about, the stipulation was.

Mr. Menzies: That is satisfactory.

Mr. Thomas: Is that correct, it was on or about that date?

Mr. Sadicoff: Yes.

Mr. Thomas: There is nothing significant in the variable of the date?

Mr. Sadicoff: That is correct.

The Court: And that on the date of the fire these were still in escrow, these documents that were delivered to the escrow holders?

Mr. Sadicoff: Yes, sir.

Mr. Thomas: Yes, sir.

The Court: They had never been taken out of escrow?

Mr. Sadicoff: No, sir. And that all payments



Plaintiffs' Exhibit No. 1—(Continued)

that were due under Exhibit D, that were due to E. F. Smith, up to and including the day of the fire, had been paid.

Mr. Thomas: Only due on the one instrument.

The Court: Exhibit C is the supplemental and modified agreement?

Mr. Sadicoff: That is right.

The Court: All the payments due Smith had been made?

Mr. Sadicoff: All the payments due Smith had been made, [148] and subsequently all payments that became due.

The Court: Let us leave out "subsequently." Let us get up to the date of the fire. Prior to the date of the fire that had been done. All right.

Where are the insurance policies?

Mr. Sadicoff: Right here. We have been so busy in the office we haven't been able to make photostats.

The Court: Have you exhibited them to the parties?

Mr. Menzies: I have seen them, your Honor.

Mr. Davis: I haven't seen them.

Mr. Thomas: I haven't either.

(The documents referred to were passed to counsel.)

Mr. Davis: I think they are wholly immaterial, as far as I am concerned, but we will look them over.

Mr. Thomas: We are just talking about the

Plaintiffs' Exhibit No. 1—(Continued)  
execution of the instruments. We needn't take any time with this. For whatever they are worth, there is no question of these being the right instruments, and that is all we are talking about.

Mr. Menzies: I don't question them.

Mr. Davis: They were executed and delivered on the date they bear.

Mr. Sadicoff: Please don't take them away from me. I haven't got photostats of them yet.

The Court: You can get them from the Clerk.

Mr. Sadicoff: Mr. Thomas, I furnished Mr. Medigovich [149] with copies of these. Do you have them?

Mr. Thomas: I don't think so. He may have them and they may be some place but I didn't happen to notice them.

Mr. Sadicoff: Will you gentlemen and the Court trust me with those documents for two days until I can get photostats because I want more than one photostat?

Mr. Davis: I will, because we haven't our policy here either.

Mr. Menzies: I haven't any objection. Let us have it marked by the Clerk and then he can photostat them.

The Court: That will be Smith's A.

Mr. Sadicoff: You will return them to me so I can get them photostated?

The Court: Yes.

Mr. Thomas: That is not Smith's documents. That shouldn't be marked Smith's exhibit.

Plaintiffs' Exhibit No. 1—(Continued)

Mr. Sadicoff: It is the policy issued by the plaintiff in this action, Jim Dandy Markets.

Mr. Davis: Make them plaintiffs' exhibit.

The Court: I want to give them a number. These will be Jim Dandy Markets Exhibit A.

Mr. Davis: All in one?

The Court: Yes.

Mr. Menzies: That will be the two policies?

The Court: Yes. [150]

(The documents referred to were marked Jim Dandy Markets Exhibit A for identification.)

The Court: The stipulation is that these policies, together with their riders and indorsements, were executed on or about the date they bear and delivered to and in the possession of the Jim Dandy Markets prior to the time and at the time of the fire?

Mr. Menzies: So stipulated.

Mr. Sadicoff: That is right.

The Court: And that the premiums are paid on them?

Mr. Menzies: So stipulated.

Mr. Thomas: So stipulated.

Mr. Davis: Yes.

Mr. Sadicoff: And at the time of the fire the assured was the Jim Dandy Markets, Inc.

Mr. Davis: That shows on the policy.

Mr. Menzies: That shows on the face of it. I will stipulate to that.

## Plaintiffs' Exhibit No. 1—(Continued)

The Court: Whatever it is. This only says Jim Dandy, Inc.

Mr. Menzies: Jim Dandy is the only name insured in the policy.

The Court: It doesn't say Jim Dandy, Inc.

Mr. Sadicoff: Yes.

Mr. Menzies: There is an indorsement blank down on the [151] second page.

The Court: Charles Schuster doing business as Jim Dandy Markets, Inc. I see. All right. That covers those then.

Mr. Sadicoff: Do you want me to file the originals or do you want me to file photostats?

Mr. Menzies: Let's have the originals in the file.

Mr. Sadicoff: All right. I will deliver the originals to the Clerk not later than Thursday of this week.

Mr. Menzies: I think the Clerk should mark the originals and the indorsements on there and then Mr. Sadicoff can photostat them.

Mr. Sadicoff: I have no objection to that.

The Court: He can photostat them this way and submit them.

Mr. Menzies: I was thinking if we had copies it would show that.

The Court: It does not make any difference one way or the other. Whichever is the most convenient to get it done.

All right. We have the insurance policies now out of the way.

Mr. Davis: May I ask one question, Mr. Sadi-



Plaintiffs' Exhibit No. 1—(Continued)

coff? We just read one assignment of lease where there were two leases but only one assignment. What does that mean? I didn't read it through.

Mr. Sadicoff: The assignment was of both leases? [152]

Mr. Thomas: That is right.

The Court: What else can we stipulate to? Are there other policies or other documents involved in this?

Mr. Thomas: Yes.

The Court: Let us get all of the documents out of the way.

Mr. Davis: The defendant Fireman's Fund, as I said before, I still don't see where we have any issue here, but the defendant Fireman's Fund will stipulate that on the 5th of July 1945 it executed and delivered its policy of insurance to E. F. Smith, a copy of which will be furnished and filed and marked in whichever way the Court desires.

The Court: Have you all examined it?

Mr. Menzies: I have never seen it.

Mr. Sadicoff: I have.

The Court: Do you have the policy here?

Mr. Davis: No, I just have a certificate of it. He has the policy.

Mr. Thomas: I have the policy.

The Court: On what date was it?

Mr. Thomas: 5th of July.

The Court: July 5, 1945, and that the premiums were paid on it?

## Plaintiffs' Exhibit No. 1—(Continued)

Mr. Davis: That the policy had not been canceled, but I will not stipulate that it was in full force and effect. [153] I will go that far.

The Court: Very well. Do you have any more documents?

Mr. Davis: That is all.

Mr. Thomas: There is another document that is in my answer, the original agreement of which the supplemental was already agreed to.

The Court: The answer of E. F. Smith?

Mr. Thomas: Yes. It is Exhibit A, as I remember it, the agreement to which the supplemental is a supplemental.

The Court: Then it is stipulated that the agreement attached as Exhibit A to the answer of E. F. Smith, dated the 1st of July of 1945, between E. F. Smith and Charles Schuster and others, was executed by the parties purporting to execute it on or about the date it bears and mutually delivered?

Mr. Sadicoff: So stipulated.

Mr. Thomas: Yes.

The Court: And that the supplemental agreement and modified agreement—well, it speaks for itself.

Mr. Thomas: That is the same.

The Court: That speaks for itself.

Now do you have any other documents?

Mr. Menzies: Your Honor, before we proceed to other documents, in regard to the two insurance policies, I think I was in error when I said they

Plaintiffs' Exhibit No. 1—(Continued)

were in full force and effect in that stipulation. It should be that they were issued and in [154] the hands of the defendant Jim Dandy Markets.

The Court: And had not been canceled?

Mr. Menzies: They had not been canceled; no.

The Court: Is that modification of the stipulation accepted?

Mr. Sadicoff: Yes.

Mr. Menzies: And the other stricken out, that they were in full force and effect.

The Court: Any other documents?

Mr. Thomas: No, I think not.

The Court: You had no insurance policy?

Mr. Thomas: I am going to bring it. That is the one Mr. Davis is talking about. That is our policy.

The Court: We have only three policies then?

Mr. Thomas: That is right. Smith had one and the others two.

The Court: Have you any other documents?

Mr. Menzies: I can't think of any.

The Court: That is all the documents then.

What else can you stipulate to?

Mr. Sadicoff: I think it should be stipulated—

The Court: Let me see, that Jim Dandy Markets the partnership was converted to a corporation?

Mr. Menzies: We won't raise any point on that. It is indorsed on the policy. [155]

Mr. Sadicoff: That the rights of the partnership theretofore existing under the name of Jim Dandy

## Plaintiffs' Exhibit No. 1—(Continued)

Markets, Inc., and prior to the fire had been transferred by mean conveyance to Jim Dandy Markets, Inc.?

The Court: A California corporation?

Mr. Sadicoff: Yes, sir.

Mr. Menzies: I will stipulate to this, that Jim Dandy Markets, Inc., by indorsement, were placed as the named assured on the policy.

Mr. Davis: The policy speaks for itself.

The Court: You have already covered that.

Mr. Menzies: That they had whatever rights, if any, that the partnership had. They succeeded to whatever rights, if any, the partnership had under that policy.

The Court: Prior to the fire?

Mr. Menzies: Prior to the fire.

The Court: That is the corporation known as Jim Dandy Markets, Inc.?

Mr. Menzies: That is correct. They succeeded to whatever interests—

The Court: Whatever rights the fictitious firm name and partnership previously had?

Mr. Menzies: That is right.

The Court: Under the policies?

Mr. Menzies: [156] Yes.

Mr. Sadicoff: That is right. And any rights that Jim Dandy Markets, the partnership, previously had.

The Court: Is one of those agreements there a transfer to the corporation?

Mr. Sadicoff: No.



Plaintiffs' Exhibit No. 1—(Continued)

The Court: Why do you not bring in that agreement?

Mr. Sadicoff: We can produce it.

Mr. Davis: I don't think there is any controversy about it.

Mr. Menzies: There is no controversy about it, and therefore it is easier to stipulate to it.

The Court: It is stipulated that they succeeded to all of the rights and interests of the partnership existing under any and all of these agreements?

Mr. Sadicoff: As relating to the so-called Atlantic store, because there was a division. We had, I think, eight or nine units.

The Court: As related to the Atlantic store?

Mr. Sadicoff: As related to the Atlantic store.

The Court: Is that stipulated?

Mr. Thomas: I am not admitting any third party rights as against my cross-claim there as would make a difference that I would waive any rights on the theory that I have admitted there was possibly an innocent third party succeeding to the rights and didn't accept the responsibilities. [157]

The Court: With that reservation is the stipulation agreeable?

Mr. Sadicoff: Yes, that is agreeable.

Mr. Menzies: I have no interest in that.

Mr. Davis: That is satisfactory with me.

The Court: Any other documents?

Mr. Menzies: Yes, I think one other thing.

Mr. Sadicoff: I think we should have a stipulation as to the value of the building.

Plaintiffs' Exhibit No. 1—(Continued)

Mr. Menzies: There is one other document.

The Court: What about proof of claim?

Mr. Menzies: That has all been taken care of, your Honor, with an adjuster's agreement as to the value and the loss and damage. I think that that should be in evidence.

The Court: Where is that?

Mr. Menzies: Mr. Sadicoff has that.

There is one other item that I don't want to forget and that is the time of payment in the escrow clause. Do you have the date of that, when they exercised their option after the fire?

Mr. Sadicoff: There wasn't any option. We are not going to stipulate to any option. There was no option.

The Court: Are there any documents prior to the fire? All this is before the fire?

Mr. Menzies: There is none that I know of. Do you know [158] of any, Mr. Thomas?

Mr. Thomas: No, I can't think of any.

Mr. Menzies: Mr. Sadicoff, do you have any others?

Mr. Sadicoff: I don't know of any.

The Court: Now you are offering to stipulate to the amount of the loss.

Mr. Sadicoff: Here is the adjuster's agreement.

The Court: What is it, in duplicate, triplicate, or what?

Mr. Davis: I have never seen it.

Mr. Sadicoff: We stipulated that there is that

Plaintiffs' Exhibit No. 1—(Continued)

other policy covering the premises, but not the same interests.

Mr. Davis: The policies speak for themselves.

Mr. Menzies: The policies speak for themselves.

Mr. Davis: I will, for the purpose of this case, and for that purpose only, because we don't know, stipulate that your loss and damage was \$32,476.92 as shown here.

The Court: As a result of the fire?

Mr. Davis: As a result of the fire.

The Court: Is that the loss and damage to the building now?

Mr. Davis: To the building described.

Mr. Sadicoff: Building only. So stipulated.

Mr. Menzies: So stipulated.

Mr. Thomas: So stipulated. [159]

The Court: Very well.

Mr. Menzies: I think that should be in evidence, that adjuster's agreement.

Mr. Davis: That is all there is in it.

Mr. Menzies: I still think it should be in evidence. Of course the record will show that there is other insurance in effect.

Mr. Davis: That wouldn't be binding on me or binding on anybody.

The Court: Do you think it is necessary?

Mr. Menzies: It does show in the record.

Mr. Thomas: You have two policies in the record already.

Mr. Menzies: That is all.

## Plaintiffs' Exhibit No. 1—(Continued)

The Court: If you don't have any objection, why not put it in evidence?

Mr. Davis: I am not bound by anything in it except my stipulation. They can put it in if they want to. I don't care.

The Court: Then you don't need to offer it now. Just make the stipulation. We are only taking things that everybody can stipulate to.

Mr. Sadicoff: How about you, Mr. Thomas, on your proofs?

Mr. Thomas: They were made—

Mr. Davis: If there weren't there will be no question raised on them anyway.

Mr. Thomas: The record was in shape there and there is [160] a proof. There are copies in the files.

Mr. Davis: As between your client?

Mr. Thomas: Yes.

Mr. Davis: If they were, it is okay with me, but if they were not it is stipulated between you and me that for the purpose of this case no question is being raised as to whether or not proofs were made.

Mr. Thomas: All right.

The Court: Those proofs will be put in evidence the proofs of loss?

Mr. Thomas: Yes.

Mr. Davis: I don't know if they were made or not.

The Court: Does this affect this?

Mr. Menzies: We have no interest in that.



Plaintiffs' Exhibit No. 1—(Continued)

Mr. Sadicoff: We have no interest in it so far.

The Court: Very well. What next can we stipulate to?

Mr. Menzies: The date that Jim Dandy placed a sum, I think \$27,300 or \$27,500, into it after the fire.

Mr. Thomas: No, it is in the file.

Mr. Sadicoff: I think it is alleged in the answer.

Mr. Thomas: I can't see the purpose of it in this case.

Mr. Davis: I don't think you stipulated to everything that was in Mr. Sadicoff's stipulation.

Mr. Menzies: This is a different matter.

Mr. Sadicoff: Do you have a copy of the prepared [161] stipulation, Mr. Menzies?

Mr. Menzies? Yes. I have it right here I think, but I don't think it is set up in there. I don't recall it.

Mr. Thomas: I didn't look that up because I didn't have it.

Mr. Menzies: I looked for it.

Mr. Sadicoff: I am quite sure it is in there. Let me find my copy.

Mr. Menzies: Here is the yellow copy, if that will help you.

Mr. Davis: I don't think you put the date of that payment in here. You just say, within a few days after payment was received.

Mr. Sadicoff: I think we should have a stipulation that as of the date of the fire the Jim Dandy

Plaintiffs' Exhibit No. 1—(Continued)  
Markets, Inc., were in possession of the destroyed premises.

Mr. Davis: So stipulated.

Mr. Thomas: Yes, that is the fact.

Mr. Menzies: That is agreeable.

Can anybody fix the date of that payment?

Mr. Sadicoff: I think I can.

Mr. Davis: I think if I were stipulating for Jim Dandy I would also stipulate the date of the execution and delivery of the plaintiff's policy. But that is your business, Mr. Sadicoff. [162]

Mr. Menzies: But Jim Dandy wasn't.

Mr. Davis: They are the predecessor in interest. Was the Jim Dandy partnership or Jim Dandy Markets in possession of this building at the time the plaintiffs' policies were issued?

Mr. Sadicoff: Our successors were in possession. At the time these policies were issued the partnership known as Jim Dandy Markets, Inc., was in possession of the premises, and at the time of the fire the successor, as relating to the Atlantic Store of Jim Dandy Markets, Inc., were in possession of the premises.

The Court: Is that stipulated to?

Mr. Menzies: We stipulated, your Honor, that at the inception the policies went to the partnership and that Jim Dandy Markets—

The Court: He is now asking to stipulate that they were in possession of these premises when the policies were issued.

Plaintiffs' Exhibit No. 1—(Continued)

Mr. Menzies: That I don't know, your Honor. I would have to rely on Mr. Thomas and Mr. Sadicoff.

Mr. Thomas: The facts are, as I understand them (and I think it was so recited in your proposed stipulation, Mr. Sadicoff) that the agreement, supplemental agreement, was executed July 1st and that you took inventory over the holidays, including the Fourth, and went into possession at 7:00 o'clock on the morning of the 5th when you opened the doors. [163]

Mr. Sadicoff: That is right.

Mr. Menzies: If that is the fact, I am perfectly willing to stipulate.

Mr. Thomas: Beginning the morning of the 5th of July 1945.

The Court: Very well. The stipulation will be that at the beginning of the morning of the 5th of July 1945, up to the date of the fire, Jim Dandy Markets, Inc., or their predecessor in interest, Jim Dandy partnership, were in possession continuously.

Mr. Menzies: That is satisfactory.

Mr. Sadicoff: That is right.

Now on the 19th day of March 1947, which is subsequent to the date of the fire, all amounts due under the supplementary agreement marked Exhibit C and attached to the answer of the defendant Jim Dandy Markets, Inc., to the cross-claim of E. F. Smith were paid.

The Court: What is that, up to the date of the fire?

## Plaintiffs' Exhibit No. 1—(Continued)

Mr. Menzies: That was after the fire.

The Court: You fixed some date when you started out?

Mr. Sadicoff: Will the reporter read my statement?

(The record referred to was read by the reporter as follows:

“Now on the 19th day of March 1947, which is subsequent to the date of the fire, all amounts due [164] under the supplementary agreement marked Exhibit C and attached to the answer of the defendant Jim Dandy Markets, Inc., to the cross-claim of E. F. Smith were paid.”)

Mr. Sadicoff (Continuing): Due or to become due. In other words, we paid them the sum of.

The Court: If it was all that was due, it would become due.

Mr. Sadicoff: That is what I said, due or to become due.

The Court: Do you know exactly how much money you paid?

Mr. Menzies: It shows on Exhibit D, on page 3d.

Mr. Sadicoff: \$27,300.

Mr. Menzies: It shows here in the escrow \$22,400. Now which is correct?

Mr. Davis: It doesn't make any difference.

Mr. Thomas: It might, but to get it clear, I think that amount is the amount that was paid subsequent to the fire and the difference between that and \$27,300 being the amount that was paid prior to the fire.



Plaintiffs' Exhibit No. 1—(Continued)

Mr. Sadicoff: That is right.

Mr. Thomas: As credited against the Atlantic store, all these stipulations going to the Atlantic store only.

The Court: Let me state the stipulation, as I understand it: that on March 19, 1947, \$22,400 was paid by whom to whom? [165]

Mr. Sadicoff: By Jim Dandy Markets, Inc., to Morrison Escrow Company, the escrow holder for the account of E. F. Smith.

The Court: In accordance with the terms of the supplemental agreement and credit applications—

Mr. Sadicoff: And that—

The Court: Just a minute—in accordance with the escrow agreement and instructions.

Mr. Sadicoff: No, in accordance with the supplementary and modified agreement and escrow instructions.

Mr. Menzies: That is satisfactory.

The Court: Is that agreeable?

Mr. Davis: That is agreeable.

Mr. Thomas: That is agreeable as to a fact. As to its materiality, we can argue that, I understand.

The Court: You just stipulate that that much money was paid on that date?

Mr. Sadicoff: And upon the payment of that amount it constituted full payment under the supplementary and modified agreement and the escrow instructions of the sum of \$27,300 due Mr. Smith from Jim Dandy Markets, Inc., with respect to the Atlantic store.

## Plaintiffs' Exhibit No. 1—(Continued)

Mr. Menzies: That is something that is a matter between yourself and Smith and is no concern of the plaintiffs.

The Court: You are stipulating to the legal effect of [166] it?

Mr. Sadicoff: That is a fact, isn't it, Mr. Thomas?

Mr. Thomas: That is the legal effect, I think, the way you stated it. You paid it and whatever purpose you had or what legal effect it had, I am not going to stipulate to.

The Court: Just the statement that it was paid. You can argue later it was in compliance with the agreement.

Mr. Sadicoff: That is satisfactory.

Mr. Davis: Off the record.

(Here followed informal discussion outside the record.)

The Court: What is next?

Mr. Thomas: To round that out, that would show then the difference between that and \$27,300 would be the amount that was credited against the payment on the Atlantic market prior to the time of the fire.

Mr. Sadicoff: That is right.

The Court: What amount was that?

Mr. Menzies: It is the difference between \$27,300 and \$22,400.

Mr. Thomas: All right.

Mr. Menzies: That would be under the original agreement, your Honor.

The Court: That prior to the fire there was paid

Plaintiffs' Exhibit No. 1—(Continued)

the difference between \$27,300 and \$22,400, is that right?

Mr. Sadicoff: That is right. [167]

Mr. Davis: May I ask this, is there any controversy between Jim Dandy and Smith on the question as to whether or not the Jim Dandy Markets had up to the date of the fire fully complied with all the terms of the two contracts and the escrow instructions?

Mr. Sadicoff: There is no controversy.

Mr. Thomas: No.

Mr. Davis: They kept their payments up in full?

Mr. Sadicoff: Yes, sir. As a matter of fact, they anticipated them.

The Court: Is that stipulated to?

Mr. Thomas: Yes.

The Court: Prior to the date of the fire there was no default in the contracts?

Mr. Thomas: That was stipulated to once earlier, I believe.

Mr. Davis: Nobody signed the stipulation. You mean today?

Mr. Thomas: Yes.

Mr. Davis: I missed it then.

The Court: What is next?

Mr. Menzies: That the execution of the various documents that have been agreed to in here, with the exception of the two insurance policies issued by plaintiffs herein, took place and transpired without the knowledge or consent of the [168] two plaintiffs.

Mr. Sadicoff: We won't stipulate to that.

## Plaintiffs' Exhibit No. 1—(Continued)

Mr. Menzies: Then may I inquire, what objection there is to that stipulation or what, if any, proof counsel may have that we did have knowledge?

The Court: What is the materiality of that?

Mr. Menzies: The materiality is this, your Honor, that if counsel is endeavoring to show a waiver of the conditions of the policy in so far as sole and unconditional ownership is concerned on the part of the company prior to or at the time of the execution of the contracts of insurance, that that is not admissible as a matter of law and is not material to these issues. That is why I ask for that stipulation, because there can be no waiver of the conditions prior to the execution of the contracts or prior to the fire. You can only waive the conditions after.

The Court: I see. He refuses to stipulate, so we will have to stipulate to something else.

What else do you have?

Mr. Menzies: Then we would like to know this, your Honor, upon what, if anything, he intends to rely upon that in order that the trial may be shortened and we may be in a position to meet this issue.

Mr. Sadicoff: I don't know that I am called upon to disclose by what witnesses we are going to prove that not to [169] be the fact. In the first place, I deem it absolutely immaterial anyhow. In the second place, if it is material, we can show, I am satisfied by a witness, that that is not the fact.

The Court: You expect to offer proof on the plaintiffs' case that you had no notice or knowledge?



Plaintiffs' Exhibit No. 1—(Continued)

Mr. Menzies: That is right. It is a matter of law, your Honor.

The Court: I mean, you expect to prove that fact?

Mr. Menzies: That is correct. That is why I expect him to stipulate to those facts. If he contends that there was a waiver I think we have a right to know it and the Court has a right to know it because it will materially affect the length of the trial. As a matter of law it is not material.

The Court: Is there a provision in the policy to the effect that they are the sole owners?

Mr. Menzies: Yes, there is, your Honor.

Mr. Sadicoff: But, Judge, under the cases we don't have to be the sole and unconditional owner in that no one else has an interest. Under the cases, they are legion to the effect that under a provision such as we have in this policy that the assured must be the sole and unconditional owner. The cases hold that a conditional vendee is the sole and unconditional owner of the policy.

The Court: Of the property. [170]

Mr. Sadicoff: Of the property. There just isn't any doubt about it. Isn't that right, Mr. Davis?

Mr. Davis: I know of no case to the contrary.

Mr. Menzies: That is true if you have a general principle of law, but you don't have that here under the evidence that is here, and that is why, if counsel is contending that there was a waiver of that condition prior to the time of loss, that will materially affect the time of trial. I think the Court should

Plaintiffs' Exhibit No. 1—(Continued)

know that because I have an answer to it here that came out of this very court, that is, the Ninth Circuit.

Mr. Davis: What case is that?

Mr. Sadicoff: What case is that?

Mr. Menzies: That is your Fidelity Union Fire Insurance Co. v. Kelleher, 13 F. (2d) 745; and to the same effect is the Great American Insurance Company v. Johnson, 25 F. (2d), rehearing denied in 27 F. (2d) 71, and certiorari was denied in 49 Supreme Court 29, 278 U. S. 629, 73 L. Ed. 548.

It was held there that a breach of an unconditional and sole ownership warranty cannot be met by preliminary proof of agent's knowledge or true ownership in an action at law on the policy providing that no agent can verbally waive terms thereof.

Mr. Davis: Those cases are all tried before our case of *Smith v. Tyson*. We have to start back and pioneer again.

Mr. Sadicoff: You have to follow the State decisions [171]

Mr. Menzies: That is true, but your very State decision that came up here under a California policy, under California law.

The Court: It might have got to the Federal Court, but it is the State Court's construction of it rather than the Federal Court's construction of it.

Mr. Menzies: That is true.

Mr. Sadicoff: What State case are you referring to?

Mr. Menzies: I am referring to this first one

Plaintiffs' Exhibit No. 1—(Continued)

here that came up, this first noted case. I believe that that still is the law.

Mr. Davis: I think your general statement might be true, but not as it relates—I am arguing Mr. Sadicoff's case because it is partially mine.

The Court: If that were the law, how could anybody who is buying a house under a trust deed insure his property?

Mr. Menzies: That is because they have either a mortgage clause indorsement on it or they have what they started out to have here, a loss payable clause, and then cancel it off.

Mr. Davis: No, the reason for that, Mr. Menzies, is that a trust deed and a mortgage is different from a deed of contract.

Mr. Menzies: Furthermore there is this, that title would not pass from the conditional vendee under the facts in this case if it were a conditional sales contract until the close [172] of escrow, and there is a California case on that particular point.

Mr. Davis: I think you will find the cases hold this, and almost unanimously—

Mr. Menzies: May I finish?

Mr. Davis: Excuse me.

Mr. Menzies: This California case is a rather recent one. It is *Vierneisel v. Rhody Land Insurance Company*, 175 Pac. (2d) 63. That was decided December 12, 1946, and it holds that title did not pass until the close of escrow and that the title still vested in the vendor and it didn't abrogate the vendor's rights and that the vendee had no right

## Plaintiffs' Exhibit No. 1—(Continued)

to the proceeds of that policy or any interest therein.

Mr. Davis: That was decided on the particular facts.

Mr. Sadicoff: As a matter of fact, you have a code section that holds under your uniform sales act that under a conditional sales contract the loss of the property falls upon the conditional vendee and not upon the conditional vendor.

Mr. Thomas: Let me put my oar in.

In the first place, as submitted by our cross-claim, whether this building was a part of the contract, whether it was a conditional sales contract or was not, that is a factual situation.

The Court: We are not going to argue the law here. Do you have any more stipulations? Mr. Sadicoff refused your [173] stipulation.

Mr. Menzies: That is the only thing I had.

The Court: Do you have any more stipulations that you want to ask, any of you?

Mr. Menzies: I think we should know whether we should be prepared on that issue, if there is going to be a contest on it.

The Court: Apparently his position is that it is immaterial.

Mr. Menzies: Then there will be no contest on that, as I understand it.

The Court: I suppose if you offer the evidence and he objects on the ground it is immaterial and I rule on it, I rule that it is material, then he will have to defend. But I will decide that at that time.

Mr. Menzies: No, I think it is the other way



Plaintiffs' Exhibit No. 1—(Continued)

around. I think up to the present moment that a prima facie case has been made out by the plaintiffs here in view of these stipulations and if counsel is contending that there was a waiver of that sole and unconditional ownership at the inception of the policy and prior to the loss, then it is a question of whether that is material as a matter of law, and that will materially affect the time of trial.

The Court: Do you have any other stipulations of fact?

Mr. Thomas: I can ask one, and that is about the policy [174] on the equipment in the store which was a subject matter directly of this contract, if it was carried with the loss payable clause and was paid by agreement between your people and Mr. Smith. I hadn't discussed that before but from my cross-claim I think it is material.

Mr. Davis: Is that in the written agreements?

Mr. Thomas: Yes, it is in the agreements, that there will be a policy on the equipment and that it will be carried with a loss payable clause. I understand that it was a fact that it was done and that the policy was paid by agreement with the parties, that is, both of them signed off.

Mr. Davis: Under your cross-claim it is really an action for reformation of these agreements.

Mr. Sadicoff: That this Court has no jurisdiction to entertain that too.

Mr. Davis: That is another serious point.

The Court: What are you doing here then? If they are properly in court on the other matter I

## Plaintiffs' Exhibit No. 1—(Continued)

think I can entertain the jurisdiction of that matter as an incident to the entire disposition of the litigation because under the statutes and under the new rules and under the cross-claims in interpleader, if you are in court on one thing you are in court on the whole controversy. At least that is what I ruled in the matter of *Mallonee v. Fahey*.

Mr. Menzies: The Ninth Circuit held about the same in a [175] recent case.

Mr. Sadicoff: Mr. Thomas, will it be stipulated, also that at no time from and after the 5th of July 1945 to the date that the building known as the Atlantic store was destroyed by fire on January 14, 1947, at no time subsequent thereto did Smith ask, demand or receive any rents for the use or occupancy of said building or of the land upon which said building was situated, and all rents and taxes, including the taxes on the building that were due and payable under the leases covering it, were paid by Jim Dandy Markets, a partnership, or Jim Dandy Markets, Inc. ?

Mr. Thomas: That isn't correct as to the taxes. There was no separate agreement or demand for rent, I will go that far, but the taxes, that statement is not correct and I won't stipulate to it.

Mr. Sadicoff: You will stipulate though—

Mr. Thomas: There was no demand for any payment of rent or otherwise other than as provided in the agreement.

Mr. Sadicoff: And no rents were paid to him.

Mr. Thomas: Whatever rents were there called

Plaintiffs' Exhibit No. 1—(Continued)

for, and there were rents paid on the land and they were paid by Jim Dandy Markets or their predecessors. The lease itself called for rent and you were a sub-lessee—that is another document that maybe ought to be in for our cross-claim—that there was a sub-lease under the original agreement. [176]

The Court: There is still another document?

Mr. Thomas: I just remembered. For the purpose of our cross-claim there is.

The Court: Is that stipulation agreeable to you as Mr. Thomas stated it?

Mr. Sadicoff: You excepted the taxes. Otherwise my stipulation is agreed to?

Mr. Thomas: I have forgotten exactly. I restated it the way it would be satisfactory. I think you had some legal conclusions in there again.

Mr. Sadicoff: No. What I was doing, Mr. Thomas, was reading from the stipulation of facts that I had prepared.

Mr. Thomas: It had some conclusions of law in it too.

Mr. Sadicoff: Let me read it over again. That at no time from the first day of July 1945 to the date that the building known as the Atlantic store was destroyed by fire on January 14, 1947, and at no time subsequent thereto did the defendant E. F. Smith ask, demand or receive any rents for the use and occupancy of said building or the land upon which said building was situated.

Mr. Thomas: Other than as covered in the agreements. If you will put that in, I will stipulate to it.

## Plaintiffs' Exhibit No. 1—(Continued)

Mr. Sadicoff: Will you stipulate to this, will you add further, and that the rents that were due under the two leases from and after the first day of July 1945 were paid to [177] the respective lessors named in said leases?

Mr. Thomas: I don't object to stipulating. We have covered it. It was not in default. Jim Dandy Markets or its predecessors were not in default at the time of the fire. Whatever they were obligated to do they had done.

Mr. Menzies: What about the payment of taxes? Who paid those?

Mr. Sadicoff: We paid the taxes and we paid the taxes on the building.

Mr. Thomas: We are not stipulating to it.

Mr. Sadicoff: All right.

The Court: What next?

Mr. Thomas: I didn't get an answer to my request as to the insurance on the facilities and equipment.

Mr. Sadicoff: There was a policy upon the equipment in which Jim Dandy Markets, a partnership, and subsequently Jim Dandy Markets, Inc., was named as the assured and E. F. Smith was named as his interests would appear.

Mr. Menzies: Under a loss payable clause.

Mr. Sadicoff: Under a loss payable clause.

Mr. Thomas: Which were issued in accordance with the agreement.

Mr. Davis: That is a conclusion.

The Court: Is that agreeable?



Plaintiffs' Exhibit No. 1—(Continued)

Mr. Sadicoff: Yes, sir. [178]

The Court: And that the losses were paid?

Mr. Thomas: The losses were paid under that policy.

The Court: Under that policy and agreed to, accepted by everybody, is that right?

Mr. Sadicoff: Wait a minute. That is not true. The losses were payable by the insurance company.

Mr. Menzies: In accordance with their contract.

Mr. Sadicoff: In accordance with their contract.

Mr. Thomas: Which would mean of course that they both signed off if they were both on there. All right.

Mr. Sadicoff: As a matter of fact, Smith didn't sign anything.

Mr. Menzies: He would have to sign the draft.

Mr. Sadicoff: He signed the draft, that is right.

Mr. Davis: Who got the money?

Mr. Sadicoff: We got the money and paid it to Smith.

Mr. Thomas: Do you know the amount of the policy and the amount that was collected?

Mr. Sadicoff: I think I got a check for about \$75,000.

The Court: Is that material?

Mr. Sadicoff: I don't think it is material.

Mr. Davis: I don't see where it is material.

The Court: Let us omit it then.

Mr. Menzies: The only part material is the loss payable clause. [179]

The Court: What next?

## Plaintiffs' Exhibit No. 1—(Continued)

Mr. Sadicoff: That following March 19, 1947 the Morrison Escrow Company delivered to Jim Dandy Markets, Inc., the following documents that are attached to the answer of the defendant Jim Dandy Markets, Inc., to the cross-claim of defendant E. F. Smith: Exhibit A, Exhibit B, Exhibit C, Exhibit E and Exhibit F. I left out the escrow instructions.

Mr. Thomas: Did that include the agreement?

The Court: Supplemental agreement.

Mr. Thomas: Was that delivered on that date?

Mr. Sadicoff: Yes.

Mr. Thomas: I will have to accept your statement that that is the fact. I don't know it. I don't question it. That was on the 19th of March at the time you paid the Atlantic store only?

Mr. Sadicoff: No, I think you are right. I want to amend that. Not Exhibit C. That is the supplementary and modified agreement. But the other exhibits that I have recited.

Mr. Thomas: The exhibits you have described are the two leases and the assignment.

Mr. Sadicoff: Two leases, assignment and bill of sale.

Mr. Thomas: All right. So stipulated.

The Court: Very well.

Mr. Thomas: Again the materiality of it is a legal question [180] to be argued when we brief it.

Mr. Sadicoff: That on the 30th day of July 1947 any sums unpaid—strike that out.

That on the 30th day of July 1947 the balance due on the sum of \$225,000, as required to be paid

Plaintiffs' Exhibit No. 1—(Continued)

by the supplementary and modified agreement, was paid to the Morrison Escrow Company for and on behalf of Smith and a few days thereafter Morrison Escrow Company paid such amount to E. F. Smith.

Mr. Thomas: I understand he has been paid but I haven't gone into that. I didn't see where it would fit into this case. I have no objection to accepting your figures as to the date or the figures.

The Court: You stipulate to it but object to its materiality?

Mr. Thomas: Yes.

The Court: Very well. It is so stipulated.

Is that all? Do you have anything more?

Mr. Sadicoff: I don't think so.

The Court: Do you have any more requests for stipulation?

Mr. Menzies: Yes.

Mr. Thomas: Could I check the date that that was paid?

Mr. Sadicoff: July 30, 1947.

Mr. Thomas: That was a couple of weeks after the payment on the Atlantic market? [181]

Mr. Sadicoff: The Atlantic market was made in March.

Mr. Thomas: That is what I was trying to get straight.

Mr. Sadicoff: I have a letter to the Morrison Escrow Company on it.

Mr. Thomas: Let it go. I don't see the materiality except it did come some time after the pay-

Plaintiffs' Exhibit No. 1—(Continued)  
ment on the Atlantic store. They were not at all together. I am willing to let it go that way.

Mr. Sadicoff: Supposing, Mr. Thomas, that we have that stipulation subject to your right to withdraw the stipulation if you find out it is not the fact?

The Court: All right.

Mr. Thomas: If we found we made a mistake there wouldn't be any question of getting it changed.

The Court: You have no requests for stipulation, Mr. Thomas?

Mr. Thomas: No.

The Court: And you, Mr. Davis?

Mr. Davis: No.

Mr. Menzies: That is all of the documents, save and except the two insurance policies that have been offered and received in evidence here; that the two plaintiffs had no knowledge of their execution and were not parties thereto.

Mr. Sadicoff: We will not stipulate to that.

The Court: That is the one you started out with.

Mr. Menzies: They speak for themselves anyway.

The Court: He says he will not stipulate to it.

Do you have any other stipulation?

Mr. Menzies: No.

The Court: Very well. Now you have all those stipulations out of the way.

Mr. Sadicoff: When do we go to trial?

The Court: Do you expect to make a motion for a summary judgment?

Mr. Menzies: I believe I will. I want the tran-



Plaintiffs' Exhibit No. 1—(Continued)

script written up, and I would like copies of these documents. Then I will read it over and endeavor to make a motion for summary judgment if we can.

The Court: I will give you a trial date now anyhow. January 27th for trial. How long will it take? Two days?

Mr. Thomas: Two days, I guess. We can finish in one.

Mr. Davis: Don't you think we ought to discuss the *modus operandi* a little bit? Mr. Thomas filed a cross-claim for reformation of all these contracts. Mr. Sadicoff denies his reformation. The insurance company is kind of on the outside looking in.

Mr. Sadicoff: It will take longer than that. You had better figure four days.

Now at the time of trial I suppose that the cross-claim for reformation should be tried first. [183]

Mr. Menzies: I believe that is correct.

Mr. Thomas: If we really brief this motion for judgment on the pleadings, if he makes one, if Mr. Menzies carries through and makes one, and we brief that it may simplify the issues very much because of clarifying the legal issues and the facts that are on these documents.

Mr. Menzies: Better give some thought to this, that it may very well complicate your situation if your reformation is tried first. That may dispose of the whole matter.

Mr. Thomas: Yes, it may save a lot of arguments on the law. That is true.

Mr. Menzies: That is correct.

## Plaintiffs' Exhibit No. 1—(Continued)

Mr. Davis: You are going to decide whether you can make a motion for summary judgment? You are going to be pretty good if you can do it, but it is worth trying. Maybe you can get rid of it.

The Court: I couldn't give you a summary judgment if I have to decide the reformation first.

Mr. Menzies: What would be the use of making that until after the determination of the question of reformation? Then you could make it.

The Court: I would not want to take this two bites at a time. I would like to have all the evidence to be put in and to be done at the time of trial.

Mr. Thomas: I am willing to lead off, that is, on the [184] question of my cross bill, and then after that evidence is in we can take up what is left.

Mr. Menzies: Could we agree on this, in so far as the plaintiffs are concerned, that the prima facie case has been established in the light of the stipulation here? That would save considerable time.

Mr. Davis: A prima facie case for what?

Mr. Sadicoff: Prima facie case for what?

Mr. Menzies: That a controversy does exist.

The Court: I will set it for trial on that date anyhow. I think Mr. Menzies' stipulation that a controversy exists, that is, a prime facie case, or just that a controversy exists, that that puts Mr. Thomas in court, because if no controversy exists you cannot intervene.

Mr. Thomas: That is right. That is one advantage I thought there would be if you wanted to make that motion. What I didn't want to do is try

Plaintiffs' Exhibit No. 1—(Continued)

all this and get a decision that there wasn't any controversy or that he wasn't in court for some reason that didn't settle the things that I had been trying.

The Court: Is there an issue raised by anybody's answer that there is no controversy?

Mr. Davis: Yes, I have raised it. There is no controversy between me and the other insurance companies, which is the only issue that I have had so far. [185]

Mr. Sadicoff: There is no controversy between the plaintiffs and us in connection with this reformation. There couldn't be.

The Court: In connection with the issues raised in his complaint?

Mr. Menzies: That is right.

Mr. Thomas: Yes. I don't follow that because a decision on this reformation would certainly rebound for him or against him very directly and distinctly.

Mr. Sadicoff: He couldn't bring an action to reform.

Mr. Davis: However, isn't it not so much a question of reformation with the Court but as to where the true facts lie?

Mr. Sadicoff: No, because of the fact that the documents as now in existence, in my opinion—and I think in Mr. Thomas' opinion because otherwise he wouldn't have brought an action for reformation—that this assignment conveys to us this building.

The Court: What I am trying to get at now is

## Plaintiffs' Exhibit No. 1—(Continued)

his complaint. He comes in and says that a controversy has arisen between you and Smith as to who is to get the money, isn't that right?

Mr. Menzies: Yes.

Mr. Sadicoff: He says he has no controversy with Smith on this policy.

Mr. Menzies: We are trying to preclude Smith coming in [186] here and saying that we are trustees for his use and benefit of this money.

The Court: What you are saying in your complaint is that either a controversy has arisen or may arise?

Mr. Menzies: Yes.

The Court: That gives jurisdiction in an interpleader suit.

Mr. Sadicoff: This is not an interpleader suit. That is the difficulty.

Mr. Menzies: It is for declaratory relief. In other words, a controversy exists and there is a diversity of citizenship between all of the parties plaintiff and all the parties defendant. We don't want to be placed in the position here that we might pay out money, if we have to pay it out to Jim Dandy, and then have Smith come in and say, well, we had an interest in that policy.

The Court: If that is the case that raises the question as to whether or not the Court has jurisdiction in the cross-claim of Smith.

Mr. Sadicoff: Exactly.

The Court: There isn't any diversity there.

Mr. Sadicoff: Certainly not.



Plaintiffs' Exhibit No. 1—(Continued)

Mr. Menzies: That is true, but it doesn't have to be as between those two.

The Court: If it were a suit in interpleader or a case [187] in the nature of an equity action, then I would have jurisdiction, but this is not.

Mr. Menzies: Declaratory relief has been held to be an equity action, your Honor.

The Court: By whom?

Mr. Menzies: By our Appellate Courts. That was our Appellate Courts. It sounds in equity because they will review all of the facts on appeal.

The Court: You mean the Ninth Circuit? They review all facts on appeal anyhow. They will go in and test the credibility of those facts. They have the right to do that.

Mr. Menzies: It sound in equity. I have that very question up before the Ninth Circuit now.

Mr. Thomas: Is that essential? I don't think it is essential to keep jurisdiction. The point is, he doesn't know whether he has a liability or not because of the controversy existing among us local people. Isn't that it essentially?

The Court: That is right. He may be in court but you may not be in court.

Mr. Sadicoff: That is right.

Mr. Thomas: But I have to be in court to settle his liability because he can't settle with Mr. Sadicoff the controversy of my reformation without me.

Mr. Sadicoff: The trouble is with it, under the cases— [188]

The Court: If that were a suit in interpleader

Plaintiffs' Exhibit No. 1—(Continued)  
and you deposited the money in court, then I would have jurisdiction.

Mr. Thomas: But you have anyway.

The Court: I do not think I have under the declaratory relief statute.

Mr. Menzies: I think you have. I think the powers are broad enough there, if any controversy arises out of that transaction that the Court has the power to hear, try and determine.

Mr. Sadicoff: There must be a controversy between the plaintiffs and the defendants, but that is not a controversy between us.

The Court: Have you raised that by a motion to dismiss?

Mr. Sadicoff: No, I have raised it by pleading that the Court has no jurisdiction.

The Court: You have?

Mr. Sadicoff: Yes, sir.

The Court: Well, let me see what the rule says: "When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the Court as to both service of process and venue and can be made parties without depriving the Court of jurisdiction of the parties before it, the [189] Court shall order them summoned to appear in the action."

Say that Smith was not a party here. Yours is a cross-complaint in intervention, isn't it?

Mr. Sadicoff: No.

Plaintiffs' Exhibit No. 1—(Continued)

Mr. Thomas: No.

Mr. Sadicoff: No intervention and this is not an interpleader.

Mr. Menzies: This is for declaratory relief.

The Court: He isn't asking declaratory relief.

Mr. Thomas: I am asking equity reformation. I am in equity.

Mr. Sadicoff: And he is a resident of California and we are residents of California.

Mr. Thomas: Before drawing these pleadings, there was a very recent case—

The Court: Why do you not make it a suit in interpleader?

Mr. Sadicoff: He wants to walk out and not pay anybody.

Mr. Menzies: We want to know. If these people are not the sole—

The Court: You do not admit any liability?

Mr. Menzies: No, we don't admit liability. We are coming in here to have our liability, if any, determined by the Court as to Jim Dandy, and if Smith has any claim on that we want to know about that. [190]

The Court: I think you perhaps had better raise that question by motion to dismiss so that I can dispose of it before the date of the trial.

Mr. Thomas: That was my point a while ago. I didn't want to try this if we were going to be thrown out on the trial. Of course you could do that if you found the facts that way.

The Court: I think it is a question of law that

## Plaintiffs' Exhibit No. 1—(Continued)

can be decided before the trial and ought to be raised in a formal way because you expect to raise the question at the trial.

Mr. Sadicoff: Certainly.

The Court: You cannot confer jurisdiction anyhow if you do not raise it.

Mr. Davis: I am just a party with nobody asking anything against me.

Mr. Thomas: Mr. Davis raised the jurisdiction in his answer too.

Mr. Sadicoff: That is right.

The Court: I think those questions ought to be raised by motion so that they can be decided.

Mr. Davis: I raised them in the answer.

Mr. Thomas: Before we go to putting all this evidence in.

The Court: Before you get ready for trial too. Then it is not a matter that you can decide off the cuff. It will [191] probably take quite a bit of research.

Mr. Davis: I said when I first came up here that I would like to try it here, but I would like to have a trial, not a pleasant meeting.

The Court: Suppose you gentlemen raise that point on your motion to dismiss, each of you?

Mr. Davis: We have. I have raised it.

Mr. Sadicoff: The judge means by a specific motion, by a formal specific motion.

The Court: If you have raised it I will set it down for argument now.

Mr. Sadicoff: Don't do it right now. I am just



Plaintiffs' Exhibit No. 1—(Continued)

snowed under and I don't know whether I am afoot or horseback in my office, and I guess a lot of the other fellows are the same way.

Mr. Thomas: Could I add something more here on this?

The Court: You both raised it in your answer. I will set down the question of jurisdiction raised in the answer of Fireman's Fund and the answer of Jim Dandy.

Mr. Thomas: I think Mr. Menzies ought to make his motion to dismiss on the pleadings because I found this condition in my review before pleading this on the jurisdiction, that if you are going to decide that he doesn't have a claim simply on the pleadings or whatnot as against his assured, it will affect the jurisdiction of the rest of these things, [192] whereas if that question is left open and has to be decided that way in the end it redounds against the jurisdiction. It seems to me that he ought to make that motion.

Mr. Davis: You mean a summary judgment, not a motion to dismiss?

Mr. Thomas: A judgment on the pleadings, or whatever you want to call it.

The Court: Here is the point: Fireman's Fund have raised the question of jurisdiction in their answer, and so has Jim Dandy in their answer to the cross-claim of Smith. So I can set those issues down for a trial on the law, on the motion to dismiss.

Mr. Thomas: Yes.

The Court: I can set it for next Monday, the

Plaintiffs' Exhibit No. 1—(Continued)  
following Monday, or the following Monday. Monday is December 22nd.

Mr. Sadicoff: We are going to have the motion to dismiss?

The Court: Of Fireman's Fund and Jim Dandy Markets.

Mr. Menzies: Not Jim Dandy Markets.

The Court: Jim Dandy Markets' motion to dismiss Smith's cross-claim.

Mr. Menzies: December 22nd?

The Court: Yes, at 10:00 o'clock.

Mr. Menzies: All right.

Mr. Sadicoff: It won't be necessary to give formal [193] notice?

Mr. Thomas: Just motions on the pleadings?

The Court: It is on the question of jurisdiction. It will only be a question of law.

Mr. Thomas: All of us will have our briefs in the same day?

The Court: You ought to have your briefs in five days in advance.

Mr. Davis: You haven't filed any cross-complaint against the Fireman's Fund?

Mr. Thomas: No.

Mr. Davis: I haven't any issue here.

The Court: You have raised the question on a motion to dismiss against the plaintiff.

Mr. Davis: Yes, but that wouldn't go to jurisdiction; that would go to stating a cause of action because, after all, we do have the requisite jurisdictional ground. We are citizens of different states. I was thinking that Mr. Thomas had filed a cross-

Plaintiffs' Exhibit No. 1—(Continued)

complaint. Nobody sued me.

Mr. Sadicoff: You are not waiving, but are you asserting your defense that this Court has no jurisdiction to entertain this action?

Mr. Davis: Such as it is against us, but he had stated no cause of action against us. It would have to be between Smith and the other fellow. [194]

The Court: I think there is some new law on that.

Mr. Thomas: Are we going to get briefs from the moving parties before we write one?

The Court: You are not going to move, you are out?

Mr. Davis: Yes. I didn't make a motion here. I was going to make a motion if Mr. Sadicoff filed a cross-complaint against me, but he didn't.

The Court: Your brief will be due December 15th, and Mr. Thomas' brief will be due—

Mr. Menzies: I think we ought to have the time split between us, your Honor.

The Court: Your brief can be filed then in two weeks or three? Your brief will be due December 8th.

Mr. Sadicoff: All right.

The Court: And reply briefs will be due the 15th.

Mr. Davis: That is on your motion for summary judgment?

Mr. Menzies: No, that is their motion to dismiss.

Mr. Davis: Between Mr. Thomas and Mr. Sadicoff?

The Court: That is right.

Mr. Thomas: But he will serve it on everybody. Everybody will be in on it because it certainly

Plaintiffs' Exhibit No. 1—(Continued)  
affects everybody.

Mr. Sadicoff: Then as I undertsand it, you are not going to make a motion to dismiss for lack of jurisdiction?

Mr. Davis: I haven't any grounds yet.

Mr. Sadicoff: All right. [195]

The Court: Very well.

(Whereupon, at 4:20 o'clock p.m., the pre-trial conference was adjourned.) [196]

### CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 1st day of December, A. D., 1947.

/s/ AGNAR WAHLBERG,  
Official Reporter. [197]

[Endorsed]: Filed June 17, 1948.



PLAINTIFFS' EXHIBIT No. 11

Nelson Gary, Insurance Adjuster  
Los Angeles, Calif.

ADJUSTER'S AGREEMENT

Whereas, Jim Dandy Markets, Inc., claims loss and damage by a fire alleged to have occurred on the 14th day of January, 1947, to certain property insured under Policy No. F 321452 issued by the Central Manufacturers Mutual and Policy No. 3170 issued by the Indiana Lumbermens Mutual Insurance Companies of Van Wert, Ohio, and Indianapolis, Indiana, by their Agency at Los Angeles, California, to Jim Dandy Markets, Assured, and

Whereas, Said Jim Dandy Markets, Inc., and the Insurance Companies, issuing said policies are mutually desirous of determining and agreeing upon the amount of such loss and damage, without regard to the liability of the Companies, and without the relinquishment or surrender on the part of said Jim Dandy Markets, Inc., of any of their rights in the premises, and without the waiver or surrender by said Insurance Companies of any of its rights or defenses or of formal proofs of loss or of any of the conditions or requirements of said policies.

Now, therefore, in consideration of the trouble and expense incident to such investigation and determination which have been incurred in the premises of said Jim Dandy Markets, Inc., and said Insurance Companies, respectively, and by way of a compromise, it is hereby stipulated and agreed that the sound cash value of said insured property, im-

## Plaintiffs' Exhibit No. 11—(Continued)

mediately preceding the loss, and the total loss and damage thereto, are as follows:

1. Composition roof frame stucco open air market building—situate 6801 Atlantic Avenue, Bell, California: Sound value, \$32,476.92; loss and damage, \$32,476.92.

And said sums as above set forth and agreed upon are hereby irrevocably accepted by the parties hereto as binding and conclusive; but it is expressly and specifically understood and agreed, by and between the parties hereto, that the question of liability has not entered into and is not in any manner covered or affected by this agreement, and said Jim Dandy Markets, Inc., shall not be held or deemed to have relinquished or surrendered any rights under said policies, beyond being bound by said sound value and loss and damage as herein set forth and agreed upon; and said Insurance Companies shall not be held or deemed to have waived any of its rights in the premises, nor waived formal proofs of loss, nor waived any of the conditions or requirements of the policies, beyond being bound by said sound value and the loss and damage as herein determined and agreed upon.

The total insurance covering all or any portion of the insured property at the time of the loss was \$41,700.00, as follows:

No. F 321452, Central Manufacturers Mutual Insurance Company, \$12,500.00.

No. 3170, Indiana Lumbermens Mutuals, \$12,500.00.

Plaintiffs' Exhibit No. 11—(Continued)

We are informed that there is a policy number A 959495 in the Firemens Fund Insurance Company and E. F. Smith is the named assured therein and said policy is in the sum of \$16,700.00 and covers on the above described premises.

In Testimony Whereof, The said parties have hereunto set their hands, this 9th day of April, 1947.

CENTRAL MANUFACTURERS MUTUAL  
INSURANCE CO.

INDIANA LUMBERMENS MUTUAL  
INSURANCE CO.,

By NELSON GARY,  
Adjusting Representative.

Signed and delivered in the presence of

(Seal)       /s/ HARRY G. SADICOFF,  
              /s/ EDWARD I. HARRIS,  
                      Jim Dandy Markets, Inc.

By /s/ LESTER WEISZ,  
      Secretary [198]

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DEFENDANT'S EXHIBIT "A"

SUB-LEASE

This Indenture, made this 1st day of July, 1945, by and between E. F. Smith, party of the first part, and Charles Schuster, Leo A. Goldberg, Earl I. Swetow, Max M. Berick and Norman Schuster, a co-partnership, doing business under the name and

Defendant's Exhibit "A"—(Continued)  
style of Jim Dandy Markets, parties of the second  
part:

Witnesseth

That, Whereas, the parties hereto have heretofore entered into a written agreement dated July 1, 1945, by one of the terms of which the party of the first part did agree with the parties of the second part to sub-lease certain properties in said agreement designated as Atlantic Store, and

Whereas, the party of the first part in compliance with said agreement does hereby sub-lease the hereinafter described property to the parties of the second part, and

Whereas, said property occupied by said store is owned by two different parties, and

Whereas, by indenture of leases dated February 1, 1942, by and between Thomas A. McLenaghan as Administrator of the Estate of E. T. Williams, deceased, and the party of the first part herein named, certain lands therein particularly described were demised to the party of the first part herein for a term of five (5) years from August 1, 1942, at the rental therein set forth. Under the terms of said lease executed by said administrator and Ethel Williams Hartley and Sarah Muriel Wellings, an option was granted to said party of the first part herein to February 1, 1952, which option the party of the first part herein will exercise within a reasonable time after the execution of this sub-lease, and

Whereas, Chas. E. Kindig and Daisy Kindig, the second owners of the property now occupied by the



Defendant's Exhibit "A"—(Continued)

Atlantic store, have entered into an agreement or lease with the party of the first part, [199] herein, said lease being dated September 29, 1941, for a term of five (5) years from August 1, 1942, to and including August 1, 1947; said lease contains an option to extend said lease to August 1, 1952, at the rent in said lease stated, and the party of the first part shall, within a reasonable time exercise said option so as to extend said lease to August 1, 1952, and

Whereas, the party of the first part has agreed with the parties of the second part to make to them an underlease or sublease of said premises upon the exact terms therein expressed, including the extension of said lease, a copy of said original leases being attached hereto, marked Exhibit "A" and Exhibit "B" and by this reference made a part hereof, and

Whereas, under the terms of said agreement heretofore executed and referred to herein, the party of the first part agrees to enter into a lease for a period of ten (10) years on all buildings now on said property and all store fixtures and equipment, including office fixtures, now owned by the party of the first part and used in the conduct of his business, and

Whereas, the party of the first part has agreed to assign all assignable licenses issued by the State of California, or any political subdivision thereof, to the parties of the second part without compensation, and

## Defendant's Exhibit "A"—(Continued)

Whereas, the party of the first part has granted to the parties of the second part an option to purchase all fixtures, equipment and good will of the business of the party of the first part, and

Whereas, the parties of the second part have deposited with the party of the first part an amount of money set forth in said executed agreement herein referred to, as advance payment on the obligations incurred by the parties of the second part in said executed agreement, as security for the faithful performance of the [200] obligations therein set forth to be performed by the parties of the second part, including the obligation to pay rent on all of the leases therein referred to:

Now, Therefore, This Indenture Witnesseth:

1. That in pursuance to said agreement and in consideration of the promises and conditions set forth in said agreement herein referred to, executed by the parties hereto on July 1, 1945, and the promises and agreements herein contained, the party of the first part does hereby demise unto the parties of the second part, all of the premises comprised in and expressed to be demised by the parties in the hereto attached original leases, To Have and to Hold said premises unto the parties of the second part for the full unexpired term of said leases, including the time referred to in the option thereon. This sub-lease is subject to a written sub-lease heretofore entered into by the party of the first part as lessor, said written sub-lease covering certain portions of said store in said sub-lease described for the sale of

Defendant's Exhibit "A"—(Continued)

fruit and vegetables, said sub-lease expiring March 1, 1946, the rental on said sub-lease being \$300.00 per month, payable to the party of the first part, and including janitor, water, light and refrigeration services; the party of the first part shall assign said sub-lease and all his interest therein to the parties of the second part.

2. The parties of the second part hereby covenant and agree with the party of the first part, that they, the parties of the second part, will pay the monthly rental set forth in said original leases on the date and in the manner therein set forth, and further agree to carry out all of the covenants and agreements contained in said original leases to be performed on the part of [201] the party of the first part, and shall not call upon the party of the first part for any repairs whatsoever in reference to the real property in said original leases described, or any of the buildings erected thereon now owned by the party of the first part, Provided Always that on the breach of any of the covenants by the parties of the second part contained in the original leases or herein contained, the party of the first part may re-enter upon said premises and immediately thereon said sub-lease shall absolutely determine, and the party of the first part hereby covenants with the parties of the second part that they, performing all of the covenants of the original leases and this sub-lease by the parties of the second part herein contained, may quietly hold and enjoy said premises during said term or any extension or renewal of said

## Defendant's Exhibit "A"—(Continued)

original leases, for a period not exceeding ten (10) years, without interruption by the party of the first part or any person claiming through him, and further that he, the party of the first part, will, during the term hereby granted, duly pay said monthly rental in said original leases reserved and will at all times keep the parties of the second part indemnified against all actions, expenses, claims and demands on account of the non-payment of the rent, or any part thereof.

3. It Is Understood and Agreed by and between the parties hereto, that the party of the first part and the parties of the second part do hereby affirm and agree to comply with the terms and conditions set forth in Paragraph 5, page 6, of the original agreement dated July 1, 1945, and executed by the parties hereto, in reference to an extension or the securing of a new lease covering the premises described in the attached original leases.

4. It Is Further Understood and Agreed by and between the parties hereto that the party of the first part is the owner [202] of the fixtures and equipment now in said store, and an inventory thereof is attached hereto, marked Exhibit "C", and made a part hereof, and the parties of the second part have agreed to lease said fixtures and equipment, which are generally referred to in paragraph 3 of said executed original agreement, and it is the desire of the parties hereto to segregate said fixtures and equipment so that the proper charge may be made to each store, as this sub-lease covers only one store



Defendant's Exhibit "A"—(Continued)

out of the eight (8) to be leased by the parties of the second part from the party of the first part, and the parties of the second part hereby agree with the parties of the first part that in addition to the rent set forth in said original leases, the parties of the second part will pay to the party of the first part as rent for the fixtures and equipment now in said store, the sum of Two Hundred Dollars (\$200.00) per month, payable monthly during the term of their occupancy of said store by virtue of this sublease, or any extension or renewal thereof, not to exceed the period of ten (10) years, but it is understood, however, that the parties of the second part shall have the right and privilege which was granted in the original executed agreement to remove or exchange any of the fixtures or equipment in said store, by replacing same with other fixtures or equipment of at least equal market value, all of said replacements to become the property of the party of the first part, and said parties of the second part will keep all of said fixtures, equipment and building in good repair.

5. It Is Further Understood and Agreed that the parties of the second part, in compliance with paragraph 12 of the executed agreement, have deposited the sum of money therein set forth with the party of the first part, said money so deposited under the terms of said executed agreement was for advance payment and security for the faithful performance of all of the obligations [203] of the parties of the second part, set forth in said executed agreement,

## Defendant's Exhibit "A"—(Continued)

including the payment of rental obligations on the part of the parties of the second part. This sublease, or any renewal or extension thereof, is to be considered a part of the rental obligations of the leases therein referred to.

6. It Is Further Understood and Agreed by and between the parties hereto that the party of the first part shall keep all fixtures and equipment owned by him in said store insured and shall pay all taxes which may become due thereon, and in the event fire shall wholly or partially destroy said fixtures, and equipment, and the parties of the second part desire to continue business in said store, the party of the first part agrees to renew said fixtures and equipment to the extent of the insurance collected thereon due to said fire.

7. It Is Mutually Understood and Agreed by and between the parties hereto that the party of the first part has assigned to the parties of the second part all assignable licenses issued by the State of California, or any political sub-division thereof, to do business upon the within-referred to property, without compensation.

8. It Is Further Understood and Agreed by and between the parties hereto that in the event the parties of the second part do not exercise the option to purchase the fixtures and equipment herein referred to at the time set forth in the executed agreement herein referred to, or the party of the first part is unable to secure any extension or renewal of the original leases herein referred to, which

Defendant's Exhibit "A"—(Continued)

is satisfactory to the parties of the second part, or this lease is terminated for any other reason whatsoever, the parties of the second part shall surrender to the party of the first part the property herein leased, together with the fixtures and equipment, in as good conditions as [204] the same now are, reasonable wear and damage by the elements excepted, and shall assign without compensation to the party of the first part all assignable licenses issued by the State of California, or any political sub-division thereof to the parties of the second part, required in the conduct of the whole or any part of the business then conducted by said parties of the second part on the property herein leased.

9. It Is Further Understood and Agreed by and between the parties hereto that the parties of the second part shall not assign this lease without the written consent of the party of the first part had and obtained.

In Witness Whereof, the parties hereto have hereunto subscribed their names the day and year first above written.

/s/ ~~E. F. SMITH,~~

Party of the first part.

.....  
.....  
.....  
.....

A co-partnership doing business under the name and style of Jim Dandy Markets, Parties of the second part. [205]

## PLAINTIFFS' EXHIBIT No. 12

January 20th, 1948—Copy of letter dated as below. Escrow No. 7559-E.

Jim Dandy Markets, Inc.  
8451 Crenshaw Boulevard  
Inglewood, California

March 20th, 1947

Morrison Escrow Company  
2640 Zoe Avenue  
Huntington Park, California

Re: Escrow between Jim Dandy Markets and  
E. F. Smith. Store at 6801 Atlantic  
Blvd., Bell, California.

Gentlemen:

In connection with the above escrow with you, there is due Mr. E. F. Smith, in connection with the market at 6801 Atlantic Boulevard, the sum of \$21,700.00.

As you doubtless know, and if not you are advised, all rights of Jim Dandy Markets, a co-partnership, under the so-called Supplementary and Modified Agreement dated June 12, 1946, between E. F. Smith and Jim Dandy Markets, a co-partnership, respecting the market at 6801 Atlantic Boulevard, Bell, have been transferred to Jim Dandy Markets, Inc.

We enclose herewith our certified check No. B2268, drawn on Bank of America National Trust & Savings Association, Inglewood Branch, in the



Plaintiffs' Exhibit No. 12—(Continued)

sum of \$1700.00, which certified check is payable to your order. We also enclose herewith Draft No. 21290 dated March 19, 1947, payable to the order of Jim Dandy Markets, Incorporated, and E. F. Smith, in the sum of \$20,000.00. Said Draft is signed by the Insurance Managers Incorporated, and drawn on Corroon & Reynolds, Inc., and payable through the Market-New Montgomery Office of the Bank of America National Trust and Savings Association, San Francisco, California. We have endorsed said Draft in Blank, and you may obtain the endorsement thereon of Mr. E. F. Smith and deposit the same in your account. When said Draft has cleared, you may pay to Mr. Smith the sum of \$21,700.00 represented by the above described Draft and Certified Check, or, if Mr. Smith so desires, you may issue your check to him for the sum of \$1,700.00 and deliver the enclosed Draft for \$20,000.00 to him and he can endorse the same and collect the proceeds. Said Draft is in payment by the Merchants and Manufacturers Insurance Company, under its policy No. 5-26489 covering insurance on fixtures at 6801 Atlantic Boulevard which were destroyed by fire on January 14, 1947, and the Draft is made payable to us and to E. F. Smith because of an insurable interest that Mr. Smith might have had in the fixtures so destroyed.

You are not to pay to Mr. Smith the said sum of \$21,700.00, under any circumstances, or deliver \$1700.00 and the aforesaid Draft to Mr. Smith un-

## Plaintiffs' Exhibit No. 12—(Continued)

less you forward to us all of the documents to which we are entitled in connection with the escrow affecting the market at 6801 Atlantic Boulevard, and unless you particularly forward to us the following:

1. Assignment of Lease dated June 27, 1946, signed by E. F. Smith, which Lease assigns the two leases that Mr. Smith had upon the so-called Atlantic Store.

2. The Bill of Sale executed by Mr. E. F. Smith and dated June 27, 1946, affecting the fixtures, etc., at said Atlantic Store.

3. The Lease dated February 1, 1942, between Thomas A. McLanaghan, as Administrator of the Estate of E. T. Williams, Dec'd, Lessor and E. F. Smith, Lessee.

4. Lease dated September 19, 1941, between Charles E. Kindig and Daisy Kindig, Lessors and E. F. Smith, Lessee.

5. Any other papers, documents and instruments which you hold in Escrow relating particularly to the so-called Atlantic Store at 6801 Atlantic Blvd., Bell, California.

Your early attention to this matter will be appreciated. Please acknowledge receipt hereof.

JIM DANDY MARKETS, INC.,

By CHARLES SCHUSTER,  
President.

Enclosures:  
CS/mc

Registered mail.

[206]

# DEFENDANT'S EXHIBIT "B"

INVENTORY.....Page.....

Sheet No..... Priced by.....

Called by.....Department.....Extended by.....

Entered by Grocery Location Dept. Examined by.....

| Check | Quantity | Description | Price | Unit | Extensions |
|-------|----------|-------------|-------|------|------------|
|-------|----------|-------------|-------|------|------------|

|  |    |                                         |  |  |  |
|--|----|-----------------------------------------|--|--|--|
|  | 1  | Front Awning                            |  |  |  |
|  | 62 | Awning Lights                           |  |  |  |
|  | 76 | Ceiling Lights with Globes & Reflectors |  |  |  |
|  | 1  | Set West Wire Iron Gates                |  |  |  |
|  | 2  | Check Stands                            |  |  |  |
|  | 3  | Basket Racks                            |  |  |  |
|  | 1  | Nat Cash Register No. S537256GG         |  |  |  |
|  | 1  | Nat Cash Register No. 3218809           |  |  |  |
|  | 1  | Nat Cash Register No. 3315148           |  |  |  |
|  | 1  | Nat Cash Register No. 3315149           |  |  |  |
|  | 3  | Turnstiles                              |  |  |  |
|  | 2  | Dollies (For empty bottles)             |  |  |  |
|  | 1  | Detectogram Scale                       |  |  |  |
|  | 14 | Grocery Stands                          |  |  |  |
|  | 1  | Bread Table                             |  |  |  |
|  | 2½ | Walls of Shelving                       |  |  |  |
|  | 1  | 7 Door Reach in Ice Box                 |  |  |  |
|  | 1  | 5 Shelf Hardware Rack                   |  |  |  |
|  | 1  | 5 Shelf Candy Rack                      |  |  |  |
|  | 1  | Cake Table                              |  |  |  |
|  | 12 | Buggies                                 |  |  |  |
|  | 43 | Buggy Baskets (Wire)                    |  |  |  |
|  | 2  | Buggy Baskets (Straw)                   |  |  |  |

Amount Forward

[207]

## Defendant's Exhibit "B"—(Continued)

INVENTORY.....Page.....

Sheet No..... Priced by.....

Called by.....Department.....Extended by.....

Entered by.....Location.....Examined by.....

| Check | Quantity | Description | Price | Unit | Extensions |
|-------|----------|-------------|-------|------|------------|
|-------|----------|-------------|-------|------|------------|

## Grocery Dept Back Room

|  |   |                                        |  |  |  |
|--|---|----------------------------------------|--|--|--|
|  | 2 | Hand Trucks                            |  |  |  |
|  | 4 | Dollies                                |  |  |  |
|  | 1 | Burroughs Adding Machine No. 9-1157182 |  |  |  |
|  | 1 | Desk Money Chest                       |  |  |  |
|  | 1 | Floor Safe                             |  |  |  |
|  | 1 | Roll Paper Rack                        |  |  |  |
|  | 1 | Gum Tape Machine                       |  |  |  |
|  | 1 | Steel Lined Trash Bin                  |  |  |  |

Amount Forward [208]

INVENTORY.....Page.....

Sheet No..... Priced by.....

Called by.....Department.....Extended by.....

Entered by Delic Location Dept Examined by.....

| Check | Quantity | Description | Price | Unit | Extensions |
|-------|----------|-------------|-------|------|------------|
|-------|----------|-------------|-------|------|------------|

|  |    |                                         |  |  |  |
|--|----|-----------------------------------------|--|--|--|
|  | 1  | Set Display Cases                       |  |  |  |
|  | 1  | Rail Light (17 Globes & Reflectors)     |  |  |  |
|  | 2  | Ceiling Fans                            |  |  |  |
|  | 1  | Std Computing Scale No. 434226          |  |  |  |
|  | 1  | Std Computing Scale No. 434225          |  |  |  |
|  | 1  | Std Computing Scale No. 444223          |  |  |  |
|  | 3  | Gum Tape Machine                        |  |  |  |
|  | 3  | Roll Paper Racks                        |  |  |  |
|  | 1  | Nat Cash Reg (No. not decipherable)     |  |  |  |
|  | 1  | National Slicer No. 46441               |  |  |  |
|  | 1  | Wall of Shelving (4 Shelves & Back Bar) |  |  |  |
|  | 3  | Knives                                  |  |  |  |
|  | 1  | Steel Sharpner                          |  |  |  |
|  | 1  | Wash Sink                               |  |  |  |
|  | 49 | Pans Assorted                           |  |  |  |
|  | 1  | Coca-Cola Beveredge Cooler              |  |  |  |
|  | 1  | Ice Box & Shelving                      |  |  |  |
|  | 1  | Frigidaire Compressor Model A5331       |  |  |  |

Amount Forward [209]



Defendant's Exhibit "B"—(Continued)

INVENTORY.....Page.....  
 Sheet No..... Priced by.....  
 Called by.....Department.....Extended by.....  
 Entered by.....Location.....Examined by.....

| Check | Quantity | Description | Price | Unit | Extensions |
|-------|----------|-------------|-------|------|------------|
|-------|----------|-------------|-------|------|------------|

Do Nut Dept.  
 1 Do-nut Display Case & Housing  
 20 Pans—enamel  
 9 Assorted Dipping Pans  
 16 Wire Trays  
 3 Wire Pans  
 1 Do-nut Machine Model DD No. 6451  
 1 Electric Fan  
 1 Nat Cash Register No. S42108966  
 1 Jacobs Scale  
 1 Cast Iron Mixing Bowl

Amount Forward [210]

INVENTORY.....Page.....  
 Sheet No..... Priced by..... 6  
 Called by.....Department.....Extended by..... 30  
 Entered by Bell Location Meat Dept Examined by.... 44

| Check | Quantity | Description | Price | Unit | Extensions |
|-------|----------|-------------|-------|------|------------|
|-------|----------|-------------|-------|------|------------|

1 Set Meat Cases  
 1 Rail Light (32 Globes & Reflectors)  
 6 Ceiling Fans  
 1 Std Computing Scale No. 392255  
 1 Std Computing Scale No. 391088  
 1 Std Computing Scale No. 392252  
 1 Std Computing Scale No. 390648  
 1 Std Computing Scale No. 387277  
 1 Std Computing Scale No. 392256  
 1 Std Computing Scale No. 392254  
 1 Std Computing Scale No. 392257  
 5 Gum Tape Machines  
 11 Roll Paper Racks  
 6 Meat Blocks  
 1 Fish Block  
 1 Nat Cash Register No. 3277859  
 1 Nat Cash Register No. 3277858  
 15 Assorted Pans  
 Turkey Puller

Amount Forward [211]

## Defendant's Exhibit "B"—(Continued)

INVENTORY.....Page.....

Sheet No..... Priced by.....

Called by.....Department.....Extended by.....

Entered by.....Location.....Examined by.....

| Check | Quantity | Description | Price | Unit | Extensions |
|-------|----------|-------------|-------|------|------------|
|-------|----------|-------------|-------|------|------------|

## Meat Dept.—Back Room

|     |  |                                |  |  |  |
|-----|--|--------------------------------|--|--|--|
| 1   |  | Jim Vaughan Power Saw          |  |  |  |
| 2   |  | Meat Blocks                    |  |  |  |
| 1   |  | Std Computing Scale No. 392253 |  |  |  |
| 1   |  | Hobart Grinder & Attachments   |  |  |  |
| 3   |  | Ceiling Fans                   |  |  |  |
| 1   |  | York Ice Machine No. 72250     |  |  |  |
| 1   |  | Cutting Table                  |  |  |  |
| 1   |  | U.S. Slicer No. 112077         |  |  |  |
| 7   |  | Assorted Pans                  |  |  |  |
| 1   |  | Roll Paper Rack                |  |  |  |
| 1   |  | Gum Tape Machine               |  |  |  |
| 1   |  | Scoop Shovel                   |  |  |  |
| 1   |  | Wash Sink                      |  |  |  |
| 1   |  | Rail Offal Tray                |  |  |  |
| 6   |  | Hook Trees                     |  |  |  |
| 1   |  | Fairbanks Scale                |  |  |  |
| 58  |  | Rail Roll Hooks                |  |  |  |
| 1   |  | Rail Scale                     |  |  |  |
| 1   |  | Ice Box                        |  |  |  |
| 11  |  | Iron Tubs                      |  |  |  |
| 231 |  | Calif. Hooks                   |  |  |  |
| 195 |  | Hooks                          |  |  |  |
| 1   |  | Turkey Puller                  |  |  |  |
| 1   |  | Fish Tank                      |  |  |  |

Amount Forward

[212]

Defendant's Exhibit "B"—(Continued)

INVENTORY March 11-45 Page.....

Sheet No..... Priced by.....

Called by.....Department: Produce Extended by.....

Entered by.....Location Bell Examined by M. S. Malone

| Check | Quantity | Description | Price | Unit | Extensions |
|-------|----------|-------------|-------|------|------------|
|-------|----------|-------------|-------|------|------------|

Equipment

|  |    |                                          |  |  |  |
|--|----|------------------------------------------|--|--|--|
|  | 1  | Platform Scale                           |  |  |  |
|  | 1  | Four Wheel Flat Truck                    |  |  |  |
|  | 3  | Hand Trucks                              |  |  |  |
|  | 6  | Hanging Scale                            |  |  |  |
|  | 1  | Potato Truck                             |  |  |  |
|  | 19 | Shop Carts                               |  |  |  |
|  | 28 | Wire Baskets                             |  |  |  |
|  | 1  | Dayton Scale 2170205                     |  |  |  |
|  | 1  | Dayton Scale 2163526                     |  |  |  |
|  | 1  | Dayton Scale 2165162                     |  |  |  |
|  | 1  | Cash Reg. 3818926-2642-TX                |  |  |  |
|  | 1  | Cash Reg. S684296KK N2033-15-7XIC        |  |  |  |
|  | 1  | Cash Reg. 3321040 2842                   |  |  |  |
|  | 2  | Staple Guns                              |  |  |  |
|  | 3  | Tape Machine                             |  |  |  |
|  | 2  | Check Stands                             |  |  |  |
|  | 9  | Veg Stands— <del>Subject to change</del> |  |  |  |
|  | 1  | Garden Hose                              |  |  |  |
|  |    | R. P. Produce                            |  |  |  |
|  |    | Gordon B. Jones                          |  |  |  |
|  |    | Everett L. Wright                        |  |  |  |
|  | 4  | Ceiling Fans                             |  |  |  |
|  | 1  | Nat Cash Reg. No. 3251856                |  |  |  |

|                |       |
|----------------|-------|
| Amount Forward | [213] |
|----------------|-------|

## Defendant's Exhibit "B"—(Continued)

INVENTORY March 11-45 Page.....

Sheet No..... Priced by.....

Called by.....Department Bell Extended by.....

Entered by.....Location Produce Examined by M. S. Malone

| Check | Quantity  | Description         | Price | Extensions |
|-------|-----------|---------------------|-------|------------|
|       | 8 cr      | Clee Carrot         | 2.50  | 20.00      |
|       | 14 cr     | Local Carrot        | 1.15  | 16.10      |
|       | 11 c      | Beet                | .85   | 9.35       |
|       | 7 c       | Turnip              | 1.00  | 7.00       |
|       | 4 c       | Spinach             | 1.15  | 4.60       |
|       | 6 c       | Gr Onions           | 2.50  | 15.00      |
|       | 2 Bx      | Rhubarb             | 3.75  | 7.50       |
|       | 17 sk     | Cabbage             | 1.40  | 23.80      |
|       | ½ c       | Brocci              | 5.25  | 2.63       |
|       | 2 cr      | Celery              | 5.00  | 10.00      |
|       | 76 cr     | Heart               | 1.60  | 121.60     |
|       | 17 cr     | Lettuce             | 4.10  | 69.70      |
|       | 2 Bx      | Choke               | 5.50  | 11.00      |
|       | 2 —       | Grass 60 lbs.       | .47   | 28.20      |
|       | 85 lbs.   | Peas                | .07   | 5.95       |
|       | 15 cr     | Bellpepper 688 lbs. | .10   | 68.80      |
|       | 20 sk     | Sp. Onion           | 2.15  | 43.00      |
|       | 45 1      | Burb                | 3.97  | 178.65     |
|       | 121 2     | Russet              | 3.22  | 389.62     |
|       | 55 L      | Tom 1540 lbs.       | .09   | 138.60     |
|       | 5½ Bx     | Pears               | 5.32  | 29.26      |
|       | 3 only    | pk Spinach          | .09   | .27        |
|       | 11 pk     | Salad               | .09   | .99        |
|       | 3 sk      | Rutabage            | 2.50  | 7.50       |
|       | 1 cr      | Pineapple           | 13.00 | 13.00      |
|       | 25 Bx (2) | Oranges             | 1.50  | 37.50      |
|       | 58 Bx (1) | Oranges             | 1.85  | 107.30     |
|       | 4½ Bx     | Lemon               | 2.50  | 11.25      |

Amount Forward 1378.17

Everett L. Wright  
Gordon B. Jones

[214]



**Defendant's Exhibit "B"—(Continued)**

INVENTORY March 11-45 Page.....

Mdse. 1857.89  
Supplies 314.64

Sheet No..... Priced by.....

Called by.....Department Bell Extended by.....

Entered by.....Location Produce Examined by M. S. Malone

| Check | Quantity | Description           | Price | Extensions  |
|-------|----------|-----------------------|-------|-------------|
|       | 13 Bx    | 64 Gfruit             | 2.20  | 28.60       |
|       | 10 Bx    | 48 Gfruit             | 2.15  | 21.50 21.50 |
|       | 5 Flat   | Avocado               | 4.35  | 21.75       |
|       | 8 Bx     | Ortley Apple          | 3.88  | 31.04       |
|       | 6 Bx     | Ort Blk Apple         | 3.88  | 23.28       |
|       | 21 Bx    | Rome Apple            | 3.88  | 81.48       |
|       | 18 Bx    | Loose Pippin 684 lbs. | .08   | 54.72       |
|       | 14 pk    | Pippin                | 3.88  | 54.32       |
|       | 22 Bx    | Delic Apple           | 3.88  | 85.36       |
|       | 2 Bx     | Bell Apple 76 lbs.    | 5½    | 4.18        |
|       | 236 lbs. | Popcorn               | 14¼   | 33.63       |
|       | 76 lbs.  | Mix Nut               | .35   | 26.60       |
|       | 26 lbs.  | Peanut                | .26   | 6.76        |
|       | 1 Flat   | Dates                 | 6.50  | 6.50        |
|       |          | R. P. C. Produce      |       |             |
|       |          | Gordon B. Jones       |       |             |
|       |          | Everett L. Wright     |       |             |

Amount Forward 479.72

[215]

## Defendant's Exhibit "B"—(Continued)

INVENTORY March 11-45 Page.....

Sheet No..... Priced by.....

Called by Supplies Department Bell Extended by.....

Entered by.....Location Produce Examined by M. S. Malone

| Check | Quantity | Description            | Price | Extensions |
|-------|----------|------------------------|-------|------------|
|       |          | <del>Garden Hose</del> |       |            |
|       | 6 qt     | Paint (6)              | 1.00  | 6.00       |
|       | 3 Bx     | Staple                 | 2.00  | 6.00       |
|       | 1 pt     | Blk Paint              | .35   | .35        |
|       | 3 pk     | 7x11 Cand.             | .88   | 2.64       |
|       | 5 pk     | 11-14 Cand. (5)        | 1.76  | 8.80       |
|       | 13 roll  | 18" Paper              | 1.70  | 22.10      |
|       | 4 balls  | 100 Full Sheet Cord    | 7.04  | 7.04       |
|       | 2 roll   | Tape Gum               | .72   | 1.44       |
|       | 8M       | 4 lb. Bags             | 1.55  | 12.40      |
|       | ½ Bx     | 3" Basket              | 3.60  | 1.80       |
|       | 6 Ball   | Twine 18 lbs.          | .44   | 7.92       |
|       | 2 Bx     | Cello Bag              | 9.00  | 18.00      |
|       | 1 Roll   | Green Wax 55 lbs.      | .11½  | 6.33       |
|       | 1100     | 10 lbs. Bag            | 2.33  | 25.63      |
|       | 2600     | 12 lbs. Bag            | 2.62  | 68.12      |
|       | 1700     | 6 lbs. Bag             | 2.34  | 39.78      |
|       | 1100     | 16 lbs. Bag            | 3.53  | 38.83      |
|       | 9000     | 4 lbs. Bag             | 1.55  | 13.95      |
|       | 500      | 10 lbs. Mesh Bag       | 5½    | 27.50      |
|       |          | R. P. C. Produce       |       |            |
|       |          | Gordon B. Jones        |       |            |
|       |          | Everett L. Wright      |       |            |

Amount Forward 314.64

[216]

[Title of District Court and Cause.]

## ORDER TRANSMITTING ORIGINAL PLAINTIFF'S EXHIBITS Nos. 2, 3 AND 4 TO CIRCUIT COURT OF APPEALS

Good cause appearing therefor, it is ordered that the clerk shall send Plaintiff's Exhibit 2, Exhibit 3, and Exhibit 4 to the Circuit Court of Appeals to

be used as a part of the record on appeal in the above-entitled action; said documents to be returned to this Court after their use in the Circuit Court has been completed.

Dated July 13, 1948.

/s/ PAUL J. McCORMICK,  
District Judge.

[Endorsed]: Filed July 13, 1948. [217]

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[Title of District Court and Cause.]

### CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 217, inclusive, contain full, true and correct copies of Complaint for Declaratory Relief; Answer of Defendant Fireman's Fund Insurance Company; Answer of Defendant Jim Dandy Markets, Inc.; Answer of E. F. Smith including Exhibit A thereto (Plaintiff's Exhibit 13 at the Trial) and excluding Exhibit B thereto, which is the same as Plaintiff's Exhibit 7 at the trial appearing at page 60 of the certified record; Cross-Claim of Defendant E. F. Smith against Defendant Jim Dandy Markets, Inc., excluding Exhibit C thereto which is the same as Plaintiff's Exhibit 10 at the trial appearing at page 73 of the certified record; Answer of Defendant Jim Dandy Markets, Inc., to Cross-Claim of Defendant E. F. Smith, including Exhibits A, B, C, D, E and F, which are Plaintiff's Exhibits 5 to 10, inclusive, at

the trial; Cross-Claim of Defendant Jim Dandy Markets, Inc., against Defendant E. F. Smith; Answer of Defendant E. F. Smith to Cross-Claim of Defendant Jim Dandy Markets, Inc.; Decision and Order; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal of E. F. Smith; Designation of E. F. Smith of Contents of Record on Appeal; Notice of Appeal of Central Manufacturers' Mutual Insurance Company et al; Statement of Points on which Appellants Central Manufacturers' Mutual Insurance Company, et al Intend to Rely on the Appeal; Designation of Central Manufacturers' Mutual Insurance Company, et al of Contents of Record on Appeal; Plaintiff's Exhibits Nos. 1, 11, 12, Defendant Smith's Exhibits A and B and Order for Transmission of Original Plaintiff's Exhibits which, together with original plaintiff's Exhibits 2, 3 and 4 and copy of reporter's transcript of proceedings on April 9, 1948, transmitted herewith, constitute the record on appeals to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$41.20 of which sum one-half has been paid by each of the appellants.

Witness my hand and the seal of said District Court this 16th day of July, A. D. 1948.

(Seal)

EDMUND L. SMITH,

Clerk.

By /s/ THEODORE HOCKE,

Chief Deputy Clerk.



In the District Court of the United States for the  
Southern District of California, Central Division

Honorable Leon R. Yankwich, Judge presiding.

No. 6838-Y—Civil

CENTRAL MANUFACTURERS' MUTUAL  
INSURANCE COMPANY, a corporation;  
INDIANA LUMBERMANS MUTUAL  
INSURANCE COMPANY, a corporation,  
Plaintiffs,

vs.

JIM DANDY MARKETS INCORPORATED,  
a corporation; FIREMAN'S FUND  
INSURANCE COMPANY, a corporation;  
E. F. SMITH,

Defendants.

REPORTER'S TRANSCRIPT OF  
PROCEEDINGS

Los Angeles, California

Friday, April 9, 1948

Appearances: For the Plaintiffs: Thomas P. Menzies, Esquire; and Harold L. Watt, Esquire. For the Defendant Jim Dandy Markets Incorporated: Harry G. Sadicoff, Esquire. For the Defendant Fireman's Fund Insurance Co.: Messrs. Hindman & Davis, By—E. Eugene Davis, Esquire. For the Defendant E. F. Smith: Clyde Thomas, Esquire; and Milan Medigovich, Esquire.

The Court: Call the case, Mr. Clerk.

The Clerk: Central Manufacturers' Mutual In-

surance Company and others versus Jim Dandy Markets and others, No. 6838-Y, Civil.

Mr. Thomas: We are ready.

Mr. Sadicoff: Ready, your Honor.

Mr. Menzies: Plaintiff is ready.

Mr. Davis: We are simply here listening, your Honor.

The Court: Would you gentlemen care to make opening statements as to the issues in the case before we have any testimony?

Mr. Sadicoff: I will be happy to make an opening statement if your Honor wants to hear me.

The Court: And you represent—

Mr. Sadicoff: I represent the defendant Jim Dandy Markets.

The Court: And who represents the plaintiff?

Mr. Menzies: I represent both the plaintiffs, your Honor, along with Mr. Watt.

The Court: Yes.

Mr. Menzies: May I proceed?

The Court: Yes, you may proceed.

Mr. Menzies: This is an action for declaratory relief [5\*] brought by the plaintiffs against the named defendants herein. The facts briefly are these.

Policies of insurance were issued to the Jim Dandy Markets, our own policy and one by the Fireman's Fund, who is a defendant in this action.

After our policies were issued there was entered

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\* Page numbering appearing at foot of page of original certified Reporter's Transcript.

into several written documents between the Jim Dandy Markets, a corporation, and E. F. Smith, wherein these various agreements of sale or whatever you choose to call them, whether conditional sales contracts or whether merely an option to purchase a number of markets. Among them I believe there were six or eight markets and among those markets there was one known as the Atlantic Market which subsequently was destroyed by fire.

In these documents the court will be required to pass upon the nature of the documents, whether or not they conveyed title to the Jim Dandy Markets or whether title remained in the vendor, Mr. Smith.

After the original document was entered into there was then a supplemental agreement.

The Court: Was this brought originally in this court or was it brought in the Superior Court?

Mr. Menzies: No; it was originally brought by us, sir.

The Court: It is under the Federal declaratory relief Act?

Mr. Menzies: That is correct. [6]

The Court: I didn't know whether it came here by removal because of diversity of citizenship.

Mr. Menzies: Diversity of citizenship exists in this way; plaintiffs are citizens of other states and all of the defendants are citizens of the State of California.

The Court: Very well.

Mr. Menzies: These documents called for certain payments to be made by the Jim Dandy Markets

to Mr. Smith. Under Mr. Smith's original lease covering the ground upon which this Atlantic Market was placed it gave Mr. Smith the title and possession and the right to remove the building at the expiration of his lease.

Then, an escrow was opened up with the Morrison Escrow Company and those instructions will be introduced into evidence here. And in that escrow was deposited certain documents that were to be delivered upon the close of the escrow and the court will be called upon to determine whether or not those escrow instructions superseded the original and supplemental agreements and the various leases that have been executed between the parties.

The fire occurred and an adjustment of the loss—an adjuster's agreement fixing between the plaintiff and the Jim Dandy Markets the sound value of the property at the time of the fire and the loss and damage as a result of the fire. That document is before the court. [7]

The Fireman's Fund Insurance Company had a policy with Mr. Smith in the sum of \$16,500. Our two policies were in the sum of \$12,500 each, or a total of \$25,000.

After the fire occurred there were still payments to be made under the original agreement and the supplemental agreement, and in accordance with the agreement between Smith and the Jim Dandy Markets, and the final payment was made covering this Jim Dandy Market after the fire. I have forgotten how many days after. Mr. Sadicoff undoubtedly will recall that date. Do you have it?



Mr. Sadicoff. Yes.

Mr. Menzies: The fire occurred in January and in March, about two months later, why, they made the payment as a result of the leases, the supplemental, or, the original agreement and the supplemental agreement and the escrow instructions.

There is first a controversy as to who actually owned the building which was occupied at the time by the Atlantic Market; whether or not at the conclusion of the lease Mr. Smith had the right to the building and the right to remove it, or whether it passed to the Jim Dandy Markets.

If Mr. Smith had the right to retain the title to the building and to remove it, then there is a question that will have to be determined as to whether this was merely a leasehold interest that the Jim Dandy Markets had or whether or not it was the intention of the parties to pass title along [8] with the lease to the building.

The Court: Let me ask you a question. How would the insurance company be interested in that?

Mr. Menzies: In this respect, your Honor. Our policy had a permit for leased ground. It also had on it sole and unconditional ownership—the regular clause—standard fire insurance policy.

The Court: I am familiar with that. I had a case very recently in which I wrote an opinion about the question of both ownership and failure to disclose the existence of an encumbrance. I wanted to know how you are interested.

Mr. Menzies: That is one point of it, sir. There

are one or two others that are involved as between the vendor and vendee.

If the court holds that situation to exist then of course our consent on leased ground would be affected in that respect—that there isn't any question but what a vendee has an insurable interest and our consent to taking that interest on leased ground would place us in the position that we would succeed to any rights that the vendee had with relation to the vendor's insurance under our subrogation provision of the policy and in that extent, I believe, that the law is this—that the vendor also has an insurable interest, but assuming that he has that interest and has it insured, he must apply the proceeds of that insurance upon [9] the vendee's indebtedness to him.

The Court: Who constructed this building? That is important, because if the building was there when this lease, as you call it, was entered into then the covenants of the lease would have to be interpreted to see if they complied with the continued presence of the building during the period of the lease, or whether the lease was terminated by the fire and if so what obligation there was so far as the remainder of the term was concerned. Was the defendant merely the lessee and merely relieved of the payment of the rents or was he entitled to something more?

Mr. Menzies: There is no fire clause in the lease as I have read them. As I understand the evidence will show this on the part of the defendants, that Mr. Smith leased this ground, constructed

the market and operated it for a time and after it was in operation this agreement to purchase, and it is the contention of some of the parties that it was merely an agreement to purchase, the contents of the building—that is, the furnishings and fixtures and stock in trade, and Mr. Smith retained the title to the building and the right to remove it at the termination of the lease. These payments were made partly on account of the purchase price of the stock in trade and the furnishings or furniture and fixtures, and as a rental under the lease.

I believe that Mr. Smith paid the taxes and then in [10] turn was reimbursed by the sub-lessee, which was the Jim Dandy Market.

Does that cover the question that your Honor had in mind?

The Court: Yes.

Mr. Menzies: Then there was another lease that I understand that the defendant Smith is intending to place in evidence, where in that lease—and you have a copy of it—there is a copy of it here—that lease is to this effect. That they acknowledge the ownership of Mr. Smith in the building and the title to it. I think that briefly are the questions.

The Court: Let me hear that again. I didn't quite get the import of the last statement.

Mr. Menzies: There is another document that has not been introduced in evidence and I understand the demands for admissions have been used and what is the result of the demands I don't know, but it affects a sub-lease under the date of the 1st of July, 1945, between Charles Solder, Leo A. Gold-

berg, Earl I. Swetow, Max M. Berick, and Norman Schuster, a co-partnership doing business under the name and style of Jim Dandy Markets.

At the outset of the transaction between Smith and the Jim Dandy Markets, the Jim Dandy Markets was operating as a partnership and thereafter it became a corporation, and [11] the corporation succeeded to all of the rights, title and interest, if any, that the partnership had in and to the business. And also assumed and agreed to pay the obligations of the partnership insofar as it affected the proceedings in this case.

There was no knowledge on the part of the plaintiffs here of any of the transactions that took place between the defendant Smith and the Jim Dandy Markets either during the time that it was a partnership or after it became a corporation. And that matter, I think, is probably in dispute. I don't think Mr. Sadicoff is—

The Court: Let me ask you this question. I have had occasion to study that problem very recently and I wrote an opinion which contains all the latest cases on the subject and the law of California which, of course, would govern here regardless of the fact that you brought it in this court. It is the substantive law of insurance and the law of California as I read it and expressed in a very recent opinion, *Gawecki vs. Fire Insurance Company*, 72 Fed. Supp. 435. That opinion was to this effect:

That the clause in the insurance policy which provides that the application shall state the owner-



ship and sole ownership, that that clause is not violated by the mere fact that there was no disclosure; that clause is violated only if there has been concealment, and that unless the company had [12] actually instituted inquiry which resulted in concealment that this clause does not apply.

Mr. Menzies: I appreciate that, your Honor.

The Court: This case didn't turn upon that point. That point was raised and I thought at first the case would turn on that point but ultimately this case turned on the proposition of the suspension of the insurance through the existence of a mortgage of which the insurance company did not have knowledge.

Mr. Sadicoff: We have cited such cases, your Honor.

The Court: I haven't had an opportunity to read your briefs, gentlemen. I am just finding my way along and trying to determine what the issues are. As I say, I am familiar generally with the principles involved and had occasion to pass on them quite recently.

Mr. Menzies: The question here will not turn on that particular point as I understand it, your Honor. The question here is whether they had an insurable interest and if they did have that then are we entitled to the contribution from the other carrier, insofar as Mr. Smith would then be a trustee, of the proceeds of that policy for the use and benefit of the Jim Dandy Markets?

The Court: Was the other carrier brought in through a third party pleading?

Mr. Menzies: We brought the other carrier in here and [13] I understand that there has been filed a cross bill. There is also the pleadings in the file of an action in reformation between Smith and the Jim Dandy Markets, Smith contending that he is the owner of the building and that the Jim Dandy Markets are not. And then I believe that Jim Dandy Markets have filed a cross bill endeavoring to secure credit for the payment of any that the Fireman's Fund—

The Court: Do you represent all the defendants?

Mr. Sadicoff: No. I represent the Jim Dandy Markets.

The Court: Who represents the defendants?

Mr. Thomas: I represent Mr. Smith and Mr. Davis represents the Fireman's Fund.

Mr. Sadicoff: Mr. Menzies, have you finished with your statement? If not, I want to supplement the statement.

The Court: That is all right. I am asking both sides to give me an idea of the issues and the others, the cross complainants or whatever they are.

Mr. Menzies: I think that primarily covers it unless some of the other gentlemen care to supplement my statement.

Mr. Sadicoff: I think Mr. Menzies overlooked some very, very important facts, otherwise I wouldn't make a statement.

For some time, your Honor, prior to July 1946 the defendant Smith was the operator of a chain

of these so-called super markets, consisting of eight units. Upon four of those units he held leases and upon four of them he owned the [14] real property.

In July of 1945 he entered into an agreement with Jim Dandy Markets, a partnership, under which he leased to Jim Dandy Markets the four properties that he owned, and under which he subleased to Jim Dandy Markets the four properties that he was leasing from others, including the market that we will doubtless all refer to as the Atlantic store, and which is the subject of this litigation.

Under that agreement of July 1945 it was provided that at the end of ten years the Jim Dandy Markets would have the right to purchase the equipment in those eight markets upon the payment to Mr. Smith of the sum of \$192,500.

They operated under that agreement until July of 1946, at which time they entered into what was denominated a supplemental and modified agreement.

The contract is dated June 12th, 1946, but I believe the evidence will show it was actually executed and delivered at the Morrison Escrow Company in Huntington Park on June 27th, 1946.

After Mr. Smith made the original agreement with Jim Dandy Markets on July 1st, 1945, he had issued to him by the defendant Fireman's Fund, a policy covering all of the buildings on all the eight stores—eight buildings, and specifying the various amounts covering each particular building and the Atlantic store. It was insured for \$14,500. [15]

Now, in July of 1946 he entered into an agreement with Jim Dandy Markets, then a partnership, under which he executed leases upon the four properties that he owned, to Jim Dandy Markets and executed an assignment of his leases on the other four, including the Atlantic store.

Now, on the Atlantic store, and also on another unit called the Ontario store, he had built the buildings, and the leases provided that at the expiration of the term of the lease or any extensions he may remove the buildings.

At the time he executed the so-called supplemental and modified agreement of June 1946, and simultaneously with the execution of that agreement, certain escrow instructions were executed by the parties, photostats of which are included in the pleadings, which escrow instructions and also the agreement provided that he would deliver into escrow an assignment of the leases, including assignments of the leases—of the two leases that he had on the Atlantic store because that property had two ownerships.

The supplemental agreement provided that he sold to Jim Dandy Markets all of the equipment in the eight stores. He assigned the leases without any reservations of rights to the building. They are out and out assignments. And the contracts provided that we were to pay him \$225,000 payable by a credit of \$50,000 of which monies he has had, and a payment of \$5,000 a month. [16]

Simultaneously with the opening of that escrow



and the execution of the supplemental agreement in June of 1946, he actually delivered assignments of leases in escrow, assigning those leases to and including the Atlantic store, to Jim Dandy Markets. Immediately upon, or very shortly after that agreement was the supplemental agreement which was executed and the escrow instructions were signed and the various documents required to be delivered into escrow by Mr. Smith, Jim Dandy Markets took out insurance upon the so-called Atlantic store in two policies that were issued by the plaintiffs in this action, each for \$12,500, making a sum total of \$25,000.

All of the payments required to be made under the supplemental agreement which, when your Honor reads it your Honor will note is not an option to buy—it is an unequivocal agreement under which Smith agrees to sell to us and we are under obligations to buy, and all of the payments were made and there was never any default in the payments, to and including the 14th day of January, 1947, at which time the Atlantic store was completely destroyed by fire.

We immediately notified our insurance carriers, the plaintiffs in this action, of the fact that the property had been destroyed by fire and there is no contention that we failed to do that—that we failed to do anything that we were required to do. [17]

Under the supplemental agreement it provides that if we want to release any of the units and take title immediately and get the various docu-

ments delivered to us out of escrow, we could do so by payment of certain specified sums—certain percentages. In March, and following the fire, and when we were not in default under the terms of the agreement, the full amount that was due under the contract for the Atlantic Store was paid to Mr. Smith and was received by him. And I think the evidence will show that in August of 1947 the sum total of \$225,000 was paid to Mr. Smith.

It is my understanding that Mr. Smith contends, but notwithstanding the fact that he executed an assignment to us of the leases which we contend carried all rights that he had, including the right to the building and the right to remove the building and the right of occupancy, that he had some sort of a mental reservation that he didn't intend to sell the buildings.

I think the evidence will show notwithstanding the fact that we were to have possession of the Atlantic store for on close to ten years and the Ontario store for ten years, and notwithstanding the fact that Smith still claims he was the owner of the Atlantic building and that he is also the owner of the building at Ontario, he never charged us any rent for it, which, we contend, of course, is proof of the fact that he intended to convey the building to us and that [18] we always thought we bought the building.

Now, I think the evidence will show that all taxes that were assessed against the Atlantic store subsequent to June of 1946 were not paid by Smith—

they were paid by us. We have always contended and still contend that we were the sole and unconditional owners of that property and that the cases are legion to the effect that you don't—that a vendee under a conditional sales contract is the sole and unconditional owner of the property.

The Court: Mr. Thomas.

Mr. Thomas: Yes, your Honor. As to the question of title. That came after the fire and that was whether the building was the subject matter of the contract and not whether the title of what was the subject passed, but whether the building was the subject matter.

Now, the general statement that Mr. Sadicoff made is a fair recital of the sequence of events but there are some things that were not mentioned and that I would like to call your Honor's attention to as showing that this building, and our theory is, that this building was never a subject matter of this contract.

Now, in the beginning the lease was a land lease only and the fact the the building burned or did not, did not affect the status of the lease. The building had been built by Smith with the privilege recited in the land lease, that at the termination of it he could remove the building, recognizing that he built it and that it was his.

Now then, it was under that lease that the original contract which leased to Jim Dandy Markets the machinery, equipment and facilities in the various markets and the stock in trade was sold

outright. The shelves and the scales and all of those things were sold or leased for ten years.

Sub-leases were made on the buildings, as Mr. Sadicoff pointed out, under which Jim Dandy Markets was holding as a sub-lessee under Smith, with the provision that if the termination of the sub-lease and the lease under which he was terminated was changed—that is, if they couldn't get a renewal and so forth he would help them to do so; if they had to pay more rent they would have to adjust it. That was all spelled out.

And while I am on the question of the sub-lease—I will change that.

After about a year's operation, as he pointed out, a new deal, a new arrangement was made by a supplemental and modified agreement which did not obliterate the old one, the modification being that the Jim Dandy Markets purchased immediately under conditional sales contract the same facilities—machinery and equipment which it had leased under the original agreement.

It then provides that that will become effective [20] on the first of the next month—the first of July, this having been done in June, and that the lease by which that equipment was leased under the original agreement will terminate and the conditional sales contract will become effective as of the first day of July 1946.

The Court: What was the date of the first one?

Mr. Thomas: The date of the first one was January 14th, 1947. Now, this contract further pro-



vided that assignments of leases would be made on the building sites where he did not own property—that is, the land, and the four in which he did. He made leases to rent those.

The contract then provided that as to such assignment of leases they would become effective after the full purchase price of the equipment had been paid and were delivered out of escrow. These assignments were delivered into escrow, as pointed out, together with a bill of sale for the facilities.

Now, the contract further provided that in the meantime the sub-lease executed under the original agreement would stay in effect. So, at the time of the fire we had this condition. That the Jim Dandy Markets were in possession under a sub-lease—

Mr. Sadicoff, this is one of the places I want to modify your statement by calling attention to the fact that no demand was made for rent, but the sub-lease executed on the Atlantic Market provides and refers to the fact that Smith is the owner of the building. It provides what rents shall be paid. It provides that it shall pay the rent as provided in the agreement and the rent which was due on the land lease. It also provides that the sub-lessee will pay and meet all other obligations provided in the land lease. The land lease provided that taxes would be paid by the lessee.

The Court: Sub-lease was between whom?

Mr. Thomas: Smith and the Jim Dandy Markets.

The Court: That was undertaken between them.

It was not an undertaking between the Atlantic and Mr. Smith.

Mr. Thomas: Undertaking between Jim Dandy and Mr. Smith.

The Court: The clauses you speak of were contained in the sub-lease between Jim Dandy Markets and Mr. Smith.

Mr. Thomas: The landowner's lease provided that Smith should pay a certain specified sum as rent and that he should pay all taxes. The sub-lease provided also, of course, that Smith owned the building.

The Court: And the sub-lease was between whom?

Mr. Thomas: Mr. Smith, the plaintiff and cross complainant, and the Jim Dandy Markets. That lease provided that certain sums would be paid. It had reference to the amount of rent that was being paid on the store for the equipment, provided that the sub-lessee would pay the rent due on the land lease and would pay all other obligations due on the land lease. In other words, the taxes.

I think the evidence will show the taxes were actually paid by Smith and refunded under the terms of the sub-lease. The point I am getting at is that that is contradictory to his statement that that was a provision provided in the writing and not in subrogation of their title.

Now, the next point I want to call your Honor's attention to was that in putting this building in as a part of it was in the fixing of values. Under the

supplemental and modified agreement each market was given a value and the value subject to a reduction because of the down payment of some \$13,000 divided according to the, pro rata, divided according to the balance there was left as the balance due on the Atlantic Market which was \$27,300, and the total value with the credit against the other was about \$31,000.

The agreed loss of this building is over \$32,000 so we have a situation to show that that was not—there is one point before that.

The contract provides that as to the equipment, facilities and so forth, the purchaser, Jim Dandy Markets, shall keep it insured with a loss payable clause to Smith. It makes no reference to the building whatsoever.

That clause was carried out. Jim Dandy Markets kept the equipment insured for \$20,000 and when the fire occurred the \$20,000 policy was paid. That was the money that went to pay off the great bulk. That was the money that went to pay off the great bulk of the debt. All but \$1,700 was the insurance money on the equipment that paid off the balance due to Mr. Smith.

Now we come then to the situation showing that the facilities, and the testimony will be, that that was the element against which the value was fixed on the store. The building would double that value so that we have a situation—the very strongest point in evidence, that the building was not included in the subject matter. He would actually be

selling it for less than fifty per cent of the established value of the property in all of these documents. Except for the sub-lease no reference is made to the building except in the assignment which was in escrow and which was not yet delivered. Now, that assignment was in exactly the same form as all of them and referred to a lease of land and buildings which, of course, was an inaccurate statement if it was intended to apply to this, and shows that it was ineptly drawn as including a building when it was not supposed to have included the building.

Our suit for reformation is to change those words on the assignment for the reason that the other documents, together with the value and the fact that they were tenants as [24] of the time of the fire under a sub-lease, recognizing the title of the building in Smith, and no provision being made at any place for any payment for the building, that therefore it was clearly not a contract to sell this market for one-half of its value, but was simply a mistake in the drawing of the assignment as to what effect it had. Furthermore, since that value is there the payment under the conditional sales contract was clearly being made on the equipment. It even shows eventually the assignment might have carried the building with it.

The fact was that it was a consequential thing and not a part of the agreement, the land lease itself having no obligation to maintain a building on there.



That is the theory on which we will submit the case.

The Court: Have you anything to say Mr. Davis?

Mr. Davis: I have been saying all the time that I am either getting a free ride here or I am not in court at all. Let me outline the situation as I see it.

In 1945 Smith was the owner of this building—held the ownership by virtue of being a lessee with the right of removal of the building. At that time, in 1945, he insured the building in the Fireman's Fund. In 1946 Smith entered into this deal with the Jim Dandy Markets by which their previous deals were modified, and at that time executed the contract, so-called conditional sales contract, and executed and delivered an assignment of the lease to this building, which carried with it, I think, without question, the ownership in the building, to the Jim Dandy Markets. After that was done the two policies executed by the plaintiffs were executed and delivered to Jim Dandy. The Fireman's Fund policy was issued in 1945 and the plaintiffs' policies were issued to Jim Dandy in 1946. The fire occurred in 1947.

Now, plaintiffs have brought an action here, the two plaintiffs, in which they join the Fireman's Fund together with all the other defendants—all citizens and residents of the State of California. The Fireman's Fund Insurance Company is a California corporation, and the sole issue, as I see it, is between the plaintiffs and Jim Dandy, because

under the law as we will cite to your Honor these contracts are wholly several.

The two plaintiffs have no interest whatsoever in the contract that Smith had with Jim Dandy. The law is positive on that point.

The Court: That is why I asked that question of Mr. Menzies, what interest they claim in any dispute with them, and, of course, his answer was that their rights may be affected, depending upon whom we find to be the owner and entitled to ownership of the building and entitled to receive this insurance. [26]

Mr. Davis: There is no issue here in this case against the Fireman's Fund. My point is there is no issue made against us except the issues made by Mr. Menzies.

The Court: Was there a motion made to strike the cross complaint on the ground the court had no jurisdiction?

Mr. Davis: I suggested it in my answer.

The Court: I found none. But if such a motion is made before me I will deny the motion unless counsel produces authorities to show that the present rules have been interpreted differently than the Supreme Court interpreted them.

Mr. Davis: Your Honor, the cross complaint is not against my client. There is no cross complaint against me. It is between Smith and the Jim Dandy Markets.

The Court: But they have not raised the point.

Mr. Davis: It was raised and withdrawn by Mr. Sadicoff.

Mr. Sadicoff: I withdrew it because I became convinced that I was wrong, and I thought it was my duty.

The Court: I was just asking the question to see what the state of the record is.

At the present time under liberal rules of pleading which, of course, obtained in California since 1925, they passed the liberal rule of pleading so any person may be joined as a defendant who has an interest or as to whom there may be a common question of law. In other words, the Federal statute is in many respects the same statute as we have had in California since 1925. As a matter of fact, the first law review article I wrote for the Southern California Law Review after it was established, was a long 40-page article on this new section.

At that time there was no precedent and I analyzed all the English precedents and whatever precedents we had in the State courts, to show the objective of this statute so that if there was a common question of law that affects you, you will be enjoined.

Mr. Sadicoff: I would like to call your attention to just one matter, and that is this, that in connection with the construction of these documents I don't think that they require any construction, but assuming that there is any ambiguity, all these documents were prepared by Mr. Smith—the documents that we signed.

The Court: That is a question, of course, to come up later on because whatever inference may be drawn from that fact only has bearing upon intent. But I don't want any particular piece of testimony called to my attention at the present time. What I want is to clarify the issue.

One more question and then I will give you a short recess, and then we will go on after twelve o'clock to make up for the time we have lost. Ordinarily when there is a pre-trial hearing it is followed by a pre-trial order which is signed by the court, and sets forth any stipulations or agreements or [28] clarification of issues. I have looked through this file and I do not find any such order.

Mr. Menzies: There is none.

The Court: Then of course there is nothing in the pre-trial hearing, unless the transcript shows some admissions, that would be of any assistance in the determination of this issue. If there is any I wish you gentlemen would call my attention to it.

Mr. Menzies: I think we can.

The Court: Let us take a short recess.

Mr. Menzies: There is one thing I believe Mr. Watt would like to call to the court's attention to supplement some of the statements that have been made.

Mr. Watt: I have this one observation to make. The statements of counsel sufficiently illustrate the reasons which have prompted the declaratory relief action, and we don't want to overlook that issue, whether the Jim Dandy Markets had an insurable



interest, and we think it will be necessary to determine the question of ownership in order to determine whether they had an insurable interest.

The Court: Mr. Watt, I am going to refer to something personal. You know my interest in the declaratory judgment law. I think you heard the first speech I ever delivered on the subject before I went on the bench, and that interest has continued. As a matter of fact, I have an article in one [29] Federal Rules decision on the subject which is a lecture I delivered at the request of Judge Wilbur when we held our first conference which analyzed all the decisions which had been made in Federal Courts up to that time. In all my writings I have called attention to the great benefit which we derived from this statute, as I used to illustrate it sometimes to my students in law school when I taught the subject of pleadings, and I had to teach declaratory judgment, I said, in the old days, if a dispute arose as to whether a man had a lease on a piece of land and could tear down a four-story building and build a twelve-story building without violating the lease, I said the man actually had to start tearing down the building and the other man had to run to court and get an injunction. Now he just goes over to the other man and he says, "Look, I want to rebuild a building which will revert to you at the end of the period." The other fellow says. "You can't," and upon that he comes to court and nobody is hurt. That is what the cases call invoking the jurisdiction of the court, whether

you use coercive measures or not, and before any detriment has been caused to anybody. So, so far as I am concerned, I welcome these declaratory judgment cases because I approve of the philosophy which lies behind this form of procedure, which, incidentally, we borrowed from England, as we have borrowed every important reform in the realm of civil procedure. I [30] want to give the English Bar and the English judges that compliment—all the good things we have in our procedure, including the rules of joinder and including declaratory judgment, we have borrowed from the English court rules which anticipated those by 30 or 40 years.

Let us take a short recess.

(Short recess.)

The Court: Proceed, gentlemen.

Mr. Thomas: May I interrupt to make this suggestion? As I understand it, all evidence will be applicable to the cross complaint and the other proceedings without having to re-introduce it on the cross complaint.

The Court: Yes, I think so. The order of proof doesn't really matter. I will qualify that by saying except such oral testimony as may come in with reference to intent. I presume oral testimony will be introduced on the subject of the intention of the parties and, of course, that shouldn't come in until the plaintiff has put in his case.

Mr. Davis: It will all be introduced subject to a motion to strike.

The Court: No, no, make your motions immediately.

Mr. Davis: Make our objections?

The Court: Make your objections at the time. I am old-fashioned, Mr. Davis. I believe in the rules of evidence. I don't keep things suspended in the air. Make your motions [31] and I will rule as to whether it is material or not.

Mr. Thomas: I didn't have that in mind. I had in mind this. Now, the plaintiff wants to offer certain documents and I will want those same documents on the cross claim.

The Court: If they are in the record you don't have to adopt them. You don't have to re-introduce them.

Mr. Thomas: That is what I didn't want to do.

The Court: If there is any evidence in the record that has a bearing upon the issues in the case the court may draw any inferences, favorable or unfavorable, to any litigant, whether his position is as an actor in the case or otherwise, the plaintiff or cross complainant or as a defendant. It isn't necessary to re-introduce the same evidence in your behalf.

Mr. Thomas: That is what I wanted to have clear.

Mr. Menzies: If the court please, at this time I will offer in evidence the reporter's transcript of the pre-trial hearing. I do that for the benefit of the court and perhaps it may shorten the time of trial here. I will ask that that be marked as Exhibit 1.

The Court: Do you want me to use the copy that is on file?

Mr. Menzies: I have it here.

The Court: There is a copy; we have the original. It may be received. [32]

Mr. Davis: I want to object to the introduction of any statements as against the defendant Fireman's Fund Insurance Company, on the ground that plaintiffs' claim or any of the pleadings in the case do not state any ground upon which relief can be granted against this defendant.

The Court: All right, the objection is overruled.

The Clerk: Plaintiffs' Exhibit 1 in evidence.

(The transcript referred to was marked Plaintiffs' Exhibit 1, and was received in evidence.)

[Plaintiffs' Exhibit No. 1 set out in full, page 139 of this Transcript of Record.]

Mr. Menzies: I will now offer in evidence photostatic copies of the policies of the Central Manufacturers' Mutual Insurance Company, being policy No. F-321452, and Policy No. 3170 of the Indiana Lumbermans Mutual Insurance Company, and ask that those two policies be marked Plaintiffs' Exhibit 2.

The court will note that in the transcript of the pre-trial hearing it was stipulated that photostatic copies might be used.

Mr. Davis: I make the same objection as previously made.



The Court: The objection will be overruled.

Mr. Sadicoff: May I suggest those be introduced in evidence as Plaintiffs' Exhibits 2 and 3, rather than have them one exhibit, Mr Menzies?

Mr. Menzies: I have no objection.

The Court: How many are there?

Mr. Menzies: Two policies.

The Court: We had better mark them separately.

Mr. Menzies: May the one of the Central Manufacturers' in order to keep the record straight, be marked Exhibit 2, and the one of the Indiana Lumbermans Mutual as Exhibit 3? May the record show that?

The Court: Yes.

(The policies referred to were marked Plaintiffs' Exhibits 2 and 3, and were received in evidence.)

Mr. Menzies: I will now offer in evidence Policy No. A-959495 of the defendant Fireman's Fund Insurance Company, and ask that be marked Exhibit 4.

Mr. Davis: To which I make the same objection, incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Davis: And upon the ground that the plaintiffs' complaint or any of the pleadings do not state grounds upon which relief can be granted against this defendant.

The Court: All right.

The Clerk: Plaintiffs' Exhibit 4 in evidence.

(The policy referred to was marked Plaintiffs' Exhibit 4, and was received in evidence.)

Mr. Menzies: Now, in order to save encumbering the record, your Honor, with additional documents, there are [34] attached to the answer of the Jim Dandy Markets, the defendant in the case, certain leases marked Exhibit A, and I will offer those exhibits that are attached to the answer of the Jim Dandy Markets as Exhibit 5, or if the court prefers, we may break them down into each document.

Mr. Sadicoff: Will you pardon a suggestion, Mr. Menzies?

Mr. Menzies: Glad to have it.

Mr. Sadicoff: In the answer of the defendant Jim Dandy Markets to the cross claim of the defendant, E. F. Smith, there is contained the various documents in chronological order and I would suggest that you, rather than having the exhibits of the answer to your complaint in evidence, that it would be the exhibits attached to the answer of the defendant Jim Dandy Markets to the cross claim of E. F. Smith.

Mr. Menzies: I have no objection to that.

The Court: All right. You have quite a large number, gentlemen. You have Exhibit A, which consists of a number of documents. Likewise, Exhibit B and Exhibit C, consist of several, and Exhibit D consist of three. I think these will be taken individually and introduced by reference.

Mr. Menzies: Very well. I will follow the court's suggestion.

They are marked here in the answer of the cross claim as Exhibit A, consisting of two pages; Exhibit B, which [35] is a letter bearing the date of February 1, 1942.

Mr. Sadicoff: That is part of the lease.

The Court: Let us do it this way. Exhibit A is an instrument, a lease dated the 29th of February, 1941, and that will become Plaintiffs' Exhibit 5.

(The lease referred to was marked Plaintiffs' Exhibit 5, and was received in evidence.)

[Printer's Note]: Plaintiffs' Exhibit No. 5 is attached to Answer of Jim Dandy Markets, Inc. to Cross Claim of E. F. Smith as Exhibit A and is set out at page 56 of this printed record.

Mr. Menzies: Then Exhibit B in the answer to the cross bill is a document bearing the date of February 1st, 1942, addressed to E. F. Smith and signed by Ethel William Hartley—I can't quite make out the signature.

Mr. Sadicoff: Sarah Muriel Wellings.

Mr. Menzies: I ask that that be marked as Exhibit 6.

The Court: All right.

(The document referred to was marked Plaintiffs' Exhibit 6, and was received in evidence.)

Mr. Sadicoff: We are making an error here. That is attached to the lease dated the 1st of February, 1942, between Thomas A. McLenaghan as Ad-

ministrator of the Estate of E. T. Williams and E. F. Smith, which is likewise Exhibit B of that.

The Court: Then they should be marked as one exhibit.

Mr. Menzies: And that will be exhibit what?

The Court: That will be Exhibit 6.

(The document referred to was marked Plaintiffs' Exhibit 6, and was received in evidence.)

[Printer's Note]: Plaintiffs' Exhibit No. 6 is attached to Answer of Jim Dandy Markets, Inc. to Cross Claim of E. F. Smith as Exhibit B and is set out at page 60 of this printed record. [36]

Mr. Menzies: Then Exhibit 6 will consist of—

The Court: Consist of the lease and the attached letter.

Mr. Menzies: That is marked Exhibit B and attached to the answer.

The Court: Yes.

Mr. Menzies: May that be received in evidence?

The Court: That has been received as No. 6.

Mr. Menzies: Now, I will offer as Exhibit No. 7 in evidence Exhibit C of the answer which is attached to the answer to the cross bill, which is entitled "Supplementary and Modified Agreement" under the date of the 12th day of June, 1946, between Smith and the partners that constitute the Jim Dandy Markets.

The Court: That will be received as Exhibit 7.

(The document referred to was marked Plaintiffs' Exhibit 7, and was received in evidence.)



[Printer's Note]: Plaintiffs' Exhibit No. 7 is attached to Answer of Jim Dandy Markets, Inc. to Cross Claim of E. F. Smith as Exhibit C and is set out at page 65 of this printed record.

Mr. Menzies: I offer in evidence as Exhibit 8 the Exhibit D which is attached to the answer to the cross bill and is entitled "Escrow Instructions", bearing the date of June 13, 1946, Escrow No. 7559-E.

The Court: You had better include the next one which is marked 3-D.

Mr. Menzies: That is correct.

The Court: They should be received as one document. [37]

Mr. Menzies: That is correct. It consists of three pages which are marked 1-D, 2-D, and 3-D.

The Court: All right, that is received as Plaintiffs' Exhibit 8.

(The documents referred to were marked Plaintiffs' Exhibit 8, and were received in evidence.)

[Printer's Note]: Plaintiffs' Exhibit No. 8 is attached to Answer of Jim Dandy Markets, Inc. to Cross Claim of E. F. Smith as Exhibit D and is set out at page 74 of this printed record.

Mr. Menzies: Now I offer in evidence as Exhibit 9, Exhibit E, which is attached to the answer to the cross bill of Smith, a document entitled "Bill of Sale." It bears the date of the 27th day of June, 1946.

The Court: It will be received as Plaintiffs' Exhibit 9.

(The document referred to was marked Plaintiffs' Exhibit 9, and was received in evidence.)

[Printer's Note]: Plaintiffs' Exhibit No. 9 is attached to Answer of Jim Dandy Markets, Inc. to Cross Claim of E. F. Smith as Exhibit E and is set out at page 84 of this printed record.

To clarify the matter, that consists of three pages, the first two of which are the bill of sale, and the third page an assignment of a lease.

Mr. Sadicoff: That is a separate lease.

Mr. Menzies: That is a different document.

The Court: I am sorry, you are right.

Mr. Menzies: That is marked Plaintiffs' Exhibit 9?

The Court: Yes.

Mr. Menzies: And I will offer as Plaintiffs' Exhibit 10, Exhibit F which is attached to the answer of the defendant Jim Dandy Markets to the cross bill of the defendant Smith, and an assignment of a lease consisting of two pages, bearing [38] the date of the 27th day of June, 1946.

The Court: It may be received.

(The document referred to was marked Plaintiffs' Exhibit 10, and was received in evidence.)

[Printer's Note]: Plaintiffs' Exhibit No. 10 is attached to Answer of Jim Dandy Markets, Inc. to Cross Claim of E. F. Smith as Exhibit

F and is set out at page 86 of this printed record.

Mr. Menzies: I don't see in the exhibit file, your Honor, the adjuster's agreement. Do you have that, Mr. Sadicoff? This appears to be a copy. Do you have the original, Mr. Sadicoff, or do you desire to keep the original?

Mr. Sadicoff: That is an executed copy. Let me go through here. I might find another copy. As far as I am concerned it can be admitted. I think the original was taken by Senator Claghorn.

Mr. Menzies: It was?

Mr. Sadicoff: Yes.

Mr. Menzies: Well, let us get a better copy. I will offer in evidence an adjuster's agreement between the plaintiffs and the Jim Dandy Markets, bearing the date of the 9th of April, 1947, and ask that that be marked Exhibit 11 in evidence.

Mr. Davis: To which the defendant Fireman's Fund objects on the grounds previously stated in the objections, and on the further ground it is not binding on the defendant Fireman's Fund.

The Court: Objection overruled. It will be received in evidence. [39]

(The document referred to was marked Plaintiffs' Exhibit 11, and was received in evidence.)

[Plaintiffs' Exhibit No. 11 set out in full, page 193 of this printed Transcript of Record.]

Mr. Menzies: May it be stipulated, your Honor, between the parties that with relation to the documents that have been received in evidence that they

were executed and delivered on or about the dates that they bear?

Mr. Sadicoff: I will, excepting that exhibits 9 and 10, being the bill of sale and the assignment of lease, it is my understanding that they were executed actually on July 27th, 1946, which was the same date that the escrow instructions were signed.

Mr. Menzies: I believe they bear that date, Mr. Sadicoff, as I recall looking at them here but—

Mr. Watt: 9 and 10 both bear the date of June 27th.

Mr. Sadicoff: I will make sure.

Mr. Menzies: That is the last two exhibits.

Mr. Sadicoff: So stipulated.

Mr. Thomas: With this reservation—delivery was into escrow of those instruments.

Mr. Sadicoff: That is right.

Mr. Thomas: Only into escrow.

Mr. Menzies: Very well. May the record show it has been stipulated that all of the documents with the exception of Plaintiffs' Exhibits 9 and 10, were executed between the parties named therein, on or about the dates they bear and [40] were delivered; that as to Exhibits 9 and 10 it will be stipulated that they were executed on or about the date that they bear but were delivered to the Morrison Escrow Company. Is that satisfactory?

Mr. Thomas: That is correct.

Mr. Sadicoff: That is satisfactory excepting that with respect to—I misstated myself before with respect to Exhibit 7, supplemental and modified agreement which bears date of June 12th, 1946. That



actually was, as I understand it, executed on or about the 27th day of June, 1946, at the same time that the bill of sale and the escrow instructions were executed.

Mr. Menzies: I have no knowledge of that. That is something we might like to offer proof on, but at least they were executed by the parties. May that be stipulated?

Mr. Sadicoff: That we will stipulate.

Mr. Menzies: And leave the dates open.

Mr. Sadicoff: Yes.

Mr. Menzies: Is that satisfactory to all concerned?

Mr. Thomas: Yes. I don't know about that date he is mentioning and I don't quite see the significance of it—the two weeks difference.

Mr. Menzies: May I ask for this stipulation, your Honor, with relation to the escrow? That the completion, if any, of the escrow took place after the fire? [41]

Mr. Sadicoff: What do you mean by "completion of the escrow?"

Mr. Menzies: Well, insofar as it affects the property involved in this litigation—that is, the Atlantic Market, that the payments of some \$27,400 were paid into the escrow after the fire.

Mr. Sadicoff: Well, I assume, Mr. Menzies, that you will stipulate and I offer this as an amendment, because I think I am going to stipulate to what you say, but in order to get the chronology of it correct, that as of the date of the fire the Jim Dandy Market was not in default in any of the pay-

ments required of it to be made to Mr. Smith. Is that so stipulated?

Mr. Menzies: I have no knowledge of that.

Mr. Thomas: I will so stipulate.

Mr. Menzies: You will have to get a stipulation from Mr. Thomas.

Mr. Sadicoff: May I have that stipulation?

Mr. Thomas: Yes.

Mr. Menzies: Have you got the checks you gave?

Mr. Sadicoff: Is it stipulated that on March 20th, 1947 there was delivered to the Morrison Escrow Company two checks, one in the sum of \$20,000 and one check in the sum of \$17,000 for Mr. Smith and in full payment of the amount due for the so-called Atlantic store? [42]

Mr. Thomas: I would prefer putting that letter in under which that was done, which gives a full recital of the facts rather than just to take the conclusion.

Mr. Sadicoff: I have no objection to putting in the entire letter.

Mr. Menzies: Give it to me please. Do you want to put it in now or later, Mr. Sadicoff?

Mr. Thomas: I think we may gain some time by talking this over after recess and go ahead with the rest of them now.

Mr. Menzies: I am just about finished, Mr. Thomas.

Mr. Sadicoff: Will you stipulate, Mr. Thomas and Mr. Menzies, that on August 1st, 1947 the full balance that was due under the supplemental and

modified agreement was paid by Jim Dandy Markets into the escrow?

Mr. Thomas: It is subsequent to the payment and the withdrawal of the documents as to the Atlantic Market, and while it is just a matter of putting in a lot of surplusage I will object to it as not being pertinent to the Atlantic store. The papers were withdrawn and paid off prior to that date. I am not sure of the dates there and I don't question that they are correct because it has all been paid off.

Mr. Sadicoff: Do you contend that we at any time were in default in our payments?

Mr. Thomas: No.

Mr. Sadicoff: Either prior or subsequent to the fire? [43]

Mr. Thomas: No, I am not making that point at all.

Mr. Sadicoff: You admit, then, that we were not in default?

Mr. Thomas: I have so stipulated.

Mr. Sadicoff: Do you so stipulate, Mr. Menzies?

Mr. Menzies: Whatever the record shows. I have no connection with that. I am not affected by it other than this, your Honor, that the payments were not made until after the fire. Insofar as your cross bill and the answer thereto is concerned I don't believe that that affects us materially and I don't think I am a party to that situation.

I will not raise any objection, however, to it being placed in evidence if opposing counsel, insofar as the cross bill is concerned, desire it.

The Court: I think it should go in at this place to keep the continuity so we will know what the factual situation is relating to the particular document.

Mr. Menzies: I understand from the discussion here in court there was some letter that accompanied that payment. I believe if that is true then the original letter should be introduced in evidence, together with the checks and that would perhaps clarify the situation.

The Court: All right.

Mr. Menzies: Do either of you gentlemen have the original letter? [44]

Mr. Sadicoff: No.

Mr. Thomas: It is with the escrow company. I have a copy submitted by them.

Mr. Sadicoff: And which we admit. Will you take our word for it, Tom?

Mr. Menzies: That is satisfactory, too. We will offer that exhibit which it attached to the demand for admissions which was presented by Mr. Smith.

The Court: All right.

Mr. Menzies: We will offer that in evidence.

The Court: Where is it?

Mr. Thomas: I am taking it apart.

The Court: Did they include it in the answers to the demands?

Mr. Menzies: No, they did not.

Mr. Thomas: It is not in the pleadings. I will offer in evidence, your Honor, a letter bearing the date of the 20th of March, 1947, addressed to the Morrison Escrow Company, signed by Jim Dandy



Markets, Inc., by Charles Schuster, president. It apparently went by registered mail and I ask that that be marked Exhibit 12.

The Court: It will be admitted.

(The document referred to was marked Plaintiffs' Exhibit 12, and was received in evidence.)

[Plaintiffs' Exhibit No. 12, set out in full, page 204 of this Transcript of Record.]

Mr. Menzies: And I believe there is a reply thereto. [45]

The Court: All right.

Mr. Menzies: I want to get one more exhibit that is attached to the answer of E. F. Smith.

Mr. Sadicoff: June 1945?

Mr. Menzies: No, the 1st day of July 1945.

The Court: My Clerk calls my attention to the fact that this case has never been officially transferred out of Judge Hall's court. We have a rule which requires a written transfer and my Clerk called my attention to the fact that it has never been transferred, either to Judge McCormick or myself and the only minute order here is the one I made on March 22nd, so I am going to have a regular form prepared. This is a matter between the judges. This carries a BH number and was transferred and re-transferred, so we will finally transfer it here, its final home.

Mr. Sadicoff: Just so long as the clerk doesn't oust us because of jurisdiction.

The Court: We have to observe these things, otherwise we have to carry the minutes under the name of either Judge Harrison or Judge Hall.

Mr. Menzies: I will offer in evidence Exhibit A which is attached to the answer of F. E. Smith to the complaint, in which documents captioned "An Agreement," and bears the date of the 1st day of July, 1945, between E. F. Smith, parties of the first part, Charles Schuster, Leo Goldberg, Earl I. Swetow, Max M. Berick, and Norman Schuster, co-partners. [46]

The Court: Is that the original agreement or supplemental agreement?

Mr. Menzies: That is the original.

The Court: Exhibit A?

Mr. Menzies: That is right.

The Court: Very well.

Mr. Menzies: Ask that be marked Exhibit 13.

The Court: It will be received.

(The document referred to was marked Plaintiffs' Exhibit 13, and was received in evidence.)

[Printer's Note]: Plaintiffs' Exhibit No. 13 is attached to Answer of E. F. Smith as Exhibit A and is set at page 27 of this printed record.

Mr. Thomas: That is Exhibit A to the complaint?

The Court: Yes, I have it. Do you want the supplemental—

Mr. Menzies: I believe the supplemental is in there under Exhibit 7.

Mr. Sadicoff: That is Exhibit 7.

Mr. Menzies: That was attached to 7.

The Court: I wanted to make certain. I haven't

looked at the contents. Then, gentlemen, the original agreement remains as Exhibit 13.

Mr. Menzies: There is one other stipulation, your Honor, that I would like to ask for at this time, and that is that the parties named in the last exhibit, constituting the partnership of the Jim Dandy Markets, were the predecessors in interest of the Jim Dandy Markets, Inc., a corporation. Do [47] you so stipulate, Mr. Thomas?

Mr. Sadicoff: What is that? Oh, yes, I will so stipulate.

Mr. Thomas: Yes.

Mr. Menzies: I think that is all, your Honor, in the way of exhibits.

The Court: Are you going to offer any more evidence?

Mr. Menzies: No. I believe, your Honor, that we have made a prima facie case and will rest and I believe the other parties have some evidence.

The Court: You mentioned something about an escrow man being here and I assumed all you wanted of him was to identify some documents. We shouldn't keep him here. He hasn't any interest in the litigation. It occurred to me perhaps we could get him out of the way if you call him to the stand to identify whatever you have in mind.

Mr. Menzies: That may have been my error. There were some escrow instructions in the hands of an agent whom I didn't know and I assumed they were, perhaps, from the Morrison Escrow Company. I have been informed to the contrary.

The Court: I wanted to accommodate the par-

ties who are interested in the litigation and let them be on their way as quickly as possible. If not, this is a good time to take our adjournment. Let me ask you gentlemen as to the manner in [48] which you desire to proceed.

Ordinarily we have followed the usual manner. The defendant would be allowed to present such testimony under his answer as he deemed proper and then the burden would shift to the cross complainant on his affirmative claim for reformation on the ground of mistake. Unless the issues in the case are such that you desire to vary that order I would be inclined to think we should follow it because it is the usual one. What do you say about that?

Mr. Thomas: That is all right.

Mr. Sadicoff: I think upon plaintiff resting—

The Court: They have rested.

Mr. Sadicoff: Then it occurs to me that it would then probably be the best way for the defendant Smith to proceed on his cross claim, on the reformation, because if your Honor should hold, for instance, that he is not entitled to reformation, then that would practically end this lawsuit as far as Smith is concerned and then the Jim Dandy Markets would be entitled to, unquestionably, to a judgment on the policies that we hold and issued by the plaintiffs in this action.

The Court: Well, gentlemen, there are two objections to that procedure. The first one is that this is a final trial. The second is that under the



rules which went into effect on the 19th of March, findings are necessary on the motion for dismissal or motion for nonsuit. That has now [49] become the law and it is required that if the court dispose of any matter on a motion to dismiss on the merits, findings be made.

That rule was announced by the Circuit Court for the Ninth Circuit in what is known as the Harvey case.

That being the case, gentlemen, it has been my attitude that if you are going to make findings you might as well hear all the testimony and on the basis of that testimony prepare findings, because it is very difficult to make findings upon a one-sided matter. I do not want to stand in the way of counsel making a proper motion to preserve his record, but I feel that all the issues in this case should be decided upon their merits after a full hearing of all the testimony and only after all the testimony is in should the court determine any of the issues rather than allow or ask Mr. Smith to make a *prima facie* case and then rule upon the matter. If we did that I would still prefer to deny the motion for the reason that if the motion is well taken then I can render a judgment on the merits after contradictory testimony such as you may choose to introduce is in, and if you feel that the testimony which may be offered by Mr. Thomas on behalf of his client is legally insufficient then you can decline to introduce testimony on the matter and rest upon his testimony, and then when all the evidence is in

argue the question as to whether the testimony is [50] legally sufficient.

I do not know the nature of the claim of mistake. Of course I am familiar with the law. I looked at my notes and I found some leading cases on the subject of reformation, which I have accumulated in my black book, with which all of you are familiar. Some of them refer to it as my black Bible, because for years I have referred to it and accumulated cases dealing with the things that come up in our courts. And of course this being governed by a State law I had to refer to State citations.

I noticed later on by glancing at the briefs, that the leading case on the subject is cited by yourself and that is the case in 175 California, *Harding vs. Robinson*, written by Judge Henshaw, which lays down the rule as to what type of mistake may be cured by reformation, and I presume you all agree it must be a mutual mistake, a mistake known to both parties or a mistake induced by fraud against the other side. So, I would prefer that all the testimony be put in, whether by way of defense or by way of defense to the cross claim, so I may determine the matter on its merits.

In Federal Rules Decisions 1, page 301, there is the following language:

“The granting of relief is discretionary. But the discretion is a judicial discretion. The court cannot refuse to exercise it when facts warrant its exercise. This would constitute an abuse of discretion which, like other [51] abuses of discretion, is reviewable.”

And under that are cited several Circuit Court cases, one from the Fourth Circuit, 92 Fed. (2d) 321; one from the Seventh Circuit, 103 Fed. (2d) 613; and one from the Sixth Circuit, 102 Fed. (2d) 104. Another one from the Sixth Circuit in 109 Fed. (2d) 690.

The reason I am referring to this is because the only way you can exercise discretion—you can determine to exercise discretion is to have all the facts before you and especially when there is a cross claim.

The object of the procedure is not attained unless we dispose of all the issues and you can't do it unless all the facts are before me. I am not foreclosing you from making any motion you desire but we will have to have all the facts brought out. I am merely suggesting that the better way would be for you to introduce whatever evidence you have and then have Mr. Thomas introduce evidence on the reformation and then you will reply, and then Mr. Menzies and Mr. Watt will have an opportunity to cross examine your witnesses insofar as they affect their rights in the matter.

Mr. Sadicoff Your Honor, I perhaps unhappily stated my position. I think that with the introduction of the evidence by the plaintiff that, in my humble opinion, a prima facie case has been established for recovery by Jim Dandy Markets upon the policies of the plaintiff. Then I thought that [52] the logical way to proceed was for Mr. Thomas to proceed in connection with his evidence on the cross claim. That is all I had in mind.

The Court: I will dispose of it in this manner, then: Will you state that so far as the complaint is concerned and the answer, that you are offering no evidence because the position you take relates merely to an interpretation of the meaning of the documents introduced, so far as they relate to the insurance policy?

Mr. Sadicoff: Yes.

The Court: Will you so state?

Mr. Sadicoff: Yes.

The Court: And that you have no additional evidence, either oral or documentary, to offer under your answer to the complaint?

Mr. Sadicoff: That is right.

The Court: That settles the whole thing. We have wasted a lot of time.

Mr. Sadicoff: Mr. Davis asked a question as to whether the record shows that we made proof of loss and that the conditions required of us to be performed, were performed, and we have a stipulation to that effect.

Mr. Menzies: Your Honor, there is an adjuster's agreement, and as your Honor is familiar with the Rule that where there is an agreement then proof of loss is dispensed with. [53] We raise no defense.

The Court: You are raising no question as to failure to comply with the requirement within the time provided by the policy or any extension thereof?

Mr. Menzies: That is right. There is an adjuster's agreement. We couldn't raise it. But I



don't want the court to understand that that goes to the question of coverage.

The Court: No; it merely complies with the conditions precedent and that is the presentation of the claim.

Mr. Menzies: That is right.

The Court: All right. Then when we reconvene Mr. Thomas is going to have the laboring oar under his cross complaint. We will recess until two o'clock p.m.

(Whereupon, at 12:50 o'clock p.m., a recess was had until 2:00 o'clock p.m. of the same day.)

Los Angeles, California,

Friday, April 9, 1948—2:00 p.m.

The Court: All right, gentlemen, you may proceed.

Mr. Thomas: If the court please, on behalf of the cross complainant Smith, I first offer a copy of a sub-lease between E. F. Smith and Charles Schuster and the other parties named before, under date of July 1, 1945.

As to form it has been agreed this is a correct copy of the one and that the original was delivered at that time. Is that so stipulated, Mr. Sadicoff?

Mr. Sadicoff: That is the copy of the sub-lease on the so-called Atlantic store?

Mr. Thomas: Yes.

Mr. Sadicoff: So stipulated.

Mr. Thomas: Also I would like to call attention to the fact that this sub-lease calls attention to two exhibits which it refers to as A and B, and which

are the original leases, which are already in evidence, and therefore have been detached from the sub-lease so as not to encumber the record by duplication of the same documents.

The Clerk: Is this admitted, your Honor?

The Court: Yes.

Mr. Menzies: How are those exhibits numbered, do you recall?

Mr. Sadicoff: They are 5 and 6. [55]

The Clerk: This is Defendants' Exhibit A in evidence.

Mr. Davis: No, the Cross Complainants'.

The Clerk: Mr. Smith is the defendant in the case.

Mr. Thomas: That is correct.

The Clerk: Then it will be designated Defendant Smith's Exhibit 1.

Mr. Menzies: That will be Defendant Smith's Exhibit A, is that correct, Mr. Clerk?

The Clerk: Defendant Smith's Exhibit A, dated July 1, 1945.

(The document referred to was marked Defendant Smith's Exhibit A, and was received in evidence.)

[Defendant Smith's Exhibit "A" set out in full, page 195 of this printed Transcript of Record.]

Mr. Thomas: The sub-lease also refers to Exhibit C, which is an inventory and which I will offer as the inventory which was taken of the fixtures and equipment in accordance with that sub-lease.

Mr. Sadicoff: July 1945?

Mr. Thomas: That is right. I offer that in evidence as Smith's exhibit next in order.

The Court: Admitted.

The Clerk: Defendant Smith's Exhibit B in evidence.

(The document referred to was marked Defendant Smith's Exhibit B, and was received in evidence.)

[Defendant Smith's Exhibit B set out in full, page 207 of this printed Transcript of Record.]

Mr. Thomas: Mr. Sadicoff has agreed to stipulate to some general facts rather than put in a lot of evidence and that is, [56] first, that the assignment of the lease which is now in as Plaintiffs' Exhibit 10, and is the assignment of the lease referred to as the Atlantic Market, which is in the same form as the assignment of leases which were signed in the other markets, that is, the Ontario, the 6th Street, and the Watts store under the same agreement except as to different names of the stores and locations and dates and which were made at the same time, and all of which were made under the original agreement, which is in as Plaintiffs' Exhibit 13. Is that correct, Mr. Sadicoff?

Mr. Sadicoff: Yes. And also I assume you will be willing to add to that stipulation that those assignments were drawn by the attorney for Mr. Smith?

Mr. Thomas: I understand they are on his paper. I asked him to be here but he begged off until the morning and I think we will have to get it clear from him, whether he wrote them originally

or whether there were some negotiations as to form. They were drawn and were on his paper—the one I put in is on his stationery, and so far as his seeing it and putting it out, I will accept the stipulation, but I have the impression there was something it was I don't know.

Mr. Sadicoff: Are you willing or are you unwilling to stipulate that they were drawn by the attorney for Mr. Smith?

Mr. Thomas: Unwilling as a complete statement of what happened, but that they were written on his paper is obvious [57] from the copy and photostat. They are on his stationery.

Mr. Sadicoff: So stipulated.

Mr. Thomas: And it is next stipulated that the sub-lease put in evidence just now as Defendant Smith's Exhibit A, is a sub-lease which Exhibit 8, the answer of the defendant Jim Dandy Markets—in other words, the one that was drawn in accordance with and under that Atlantic lease—sub-lease, the Atlantic Market which is—no, that isn't right.

Mr. Sadicoff: The document speaks for itself, Mr. Thomas.

Mr. Thomas: Well, it probably does. I will withdraw that. In the bill of sale, which is Plaintiffs' Exhibit 9, the bill of sale refers to an inventory attached to a sub-lease, and I understand it is stipulated that the inventory put in as Defendant Smith's Exhibit B, is the inventory referred to in that document.

Now, there are no dates on the inventory that



identify it except by that stipulation as being the one referred to. That is why I think a stipulation there is in order. Will that be stipulated? That that is the only one they have had at the Atlantic store as between the parties?

Mr. Sadicoff: No, because of the fact that—well, that might be true excepting, of course, I don't want to be foreclosed from contending that the assignment carried with it the assignment of the leases on the Atlantic store, carried [58] with it any rights that Mr. Smith had in the building.

Mr. Thomas: All I am asking for is an identification of the document.

Mr. Sadicoff: As to that, we will stipulate as to the document.

The Court: Counsel can't stipulate to what inferences you want to draw from it. He is merely stipulating that this is the document in the way of an assignment, isn't that true?

Mr. Thomas: That is correct.

The Court. What legal effect it has is a matter for the court to determine after argument.

Mr. Sadicoff: That is right.

Mr. Thomas: I am just tying the documents in together.

Mr. Sadicoff: Okay, so stipulated.

Mr. Thomas: I may have covered this one. I put in Smith's Exhibit A but to be sure the original sub-lease, Defendant's Exhibit A, was delivered to the defendants' predecessor at the time it was drawn.

Mr. Sadicoff: So stipulated.

Mr. Thomas: Call Mr. Smith.

But before starting the examination of Mr. Smith, your Honor, I might state that after all there a lot of things that have been covered and that are in these documents. I think your Honor, however, has been alert enough and is [59] alert enough with the extent of it to try it and—

The Court: I have had an opportunity to examine the pleadings since this morning more carefully, and the cross claim pleads in very simple language just one fact. I commend you on the brevity of it, Mr. Thomas. It only covers three pages, and it merely says that in executing the assignment it was not the intention to convey any interest in the building. That being true, I believe your testimony should be limited to that fact.

Mr. Thomas: That is my intention, your Honor.

The Court: Unless there is something not appearing on the face of the other documents which would throw light upon what was done before this.

Mr. Thomas: You have anticipated what I was concerned with. In other words, this testimony might appear too limited at first, but my idea is to go to the thing we are talking about.

The entire configuration of the transaction appears from the documentary evidence which is already in evidence, and so far as the main suit is concerned counsel for the plaintiffs and the defendant Jim Dandy Markets at least, without our back-seat rider, Mr. Davis, have agreed that so far as

their litigation is concerned, all the elements, factual elements upon which it is to be decided are contained in those documents. So, the only thing that remains for us [60] at the present time is to supplement it by any evidence which goes to the allegations of this cross bill, as I have already stated. So, there is no need to go into any prior negotiations or anything else, but confine ourselves to the narrow allegations of the cross claim.

The Court: When your testimony is in then, of course, you can argue the entire field—the entire field is open to you, because, as I said before, those exhibits, whether you adopted them or not, are before the court for whatever inference may be drawn, favorably to you or unfavorably to you, just as they are to every other litigant in this lawsuit.

Mr. Thomas: Mr. Smith, will you take the stand?

E. F. SMITH,

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The clerk: State your full name.

The Witness: E. F. Smith.

Direct Examination

By Mr. Thomas:

Q. Mr. Smith, you are the defendant E. F. Smith, named in this action? A. Yes.

Q. Mr. Smith, did you conduct the negotiations for the sale of your chain of markets which have

(Testimony of E. F. Smith)

been referred to in [61] the talk here in court today, and as set out in the contract which was executed on the 1st day of July, 1945, introduced here as Plaintiffs' Exhibit 13? Do you remember that document?

A. Mr. Thomas, I didn't get what you said right at the start. I am a little bit hard of hearing.

Q. Did you personally conduct—

The Court: If Mr. Smith is hard of hearing I have no objection to counsel sitting opposite Mr. Sadicoff.

Mr. Sadicoff: And I have no objection to his sitting there.

The Court: Sometimes, but very rarely in this court, I have to keep attorneys far apart from each other. I don't think there is that danger between you two gentlemen.

Mr. Thomas: No, I don't think so, either. It was the length of my question, rather than my voice that caused him not to hear me.

Q. By Mr. Thomas: I asked you if you negotiated or, rather, handled the negotiations yourself or was it done through an agent?

A. Why, the negotiations were through, I guess you would say, an agent—Mr. Johnston. In other words, the whole transaction was discussed between myself and Mr. Johnston, and then between Mr. Johnston and the parties that were buying.

Mr. Menzies: Will you please keep your voice up? [62]



(Testimony of E. F. Smith)

Mr. Thomas: I think maybe he will talk louder.

The Witness: Shall I repeat that again?

The Court: I think the reporter can read it.

(Answer read.)

The Witness: May I correct that statement in one small point?

Mr. Thomas: Yes.

A. Mr. Schuster approached me one time at the Hollywood race track, several days prior to the real negotiations of the transaction, and more or less outlined his idea of purchasing the markets instead of letting them run the nine years. We only discussed it for a matter of about, approximately ten minutes between races, and then he said he would take it up and explain his ideas thoroughly to Mr. Johnston, and that Mr. Johnston would contact me, which he did later on.

Q. By Mr. Thomas: Is Mr. Schuster the only one of the persons who were then partners—Mr. Schuster, Goldberg, Mr. Berick and Mr. Norman Schuster—those are the people who are named in the first sale as a co-partnership of the Jim Dandy Markets. And did you talk to any one of those people other than the conversation you just referred to with Mr. Schuster?

A. In regard to the purchase instead of the original agreement? [63]

Q. No, I am talking now about the original agreement.

(Testimony of E. F. Smith)

A. The original agreement?

Q. Was the reference that you just made to the original agreement or the second agreement?

A. No, to the modified agreement. I misunderstood you.

Q. Now, let us go back to the first agreement. Did you talk to any of them at that time?

A. No, sir.

Q. At no time at all until after the agreement was signed?

A. The entire agreement was handled through Mr. Johnston as far as I was concerned, outside of my attorney drawing the papers.

Q. Now, when did you first hear a suggestion of modifying the agreement?

A. I just answered that statement.

Q. That was the one you just referred to?

A. Yes.

Q. And about what date was that?

A. Well, I would say that would have been about 11 months later—no, the first agreement—that was probably a month prior to the second agreement or the modified agreement.

Q. In other words, the second agreement was executed [64] during the month of June, 1946. The first agreement was executed the first day of July, 1945, so this conversation was sometime around the 1st or shortly prior to the 1st of June, 1946, would you say?

A. Well, not more—I mean not earlier than that

(Testimony of E. F. Smith)

time. My memory is a little vague, but it was prior to that time—a matter of perhaps two weeks or perhaps three weeks. I don't know. He brought the subject up to me and later on Mr. Johnston approached me about it.

Q. Was there any conversation at that time relative to changing the agreement other than the changing to a purchase agreement instead of a lease?

A. At the time when Mr. Schuster spoke to me you mean?

Q. Yes.

A. No, the main topic of our conversation was at that time in regards to how much tax I would have to pay if I sold the markets. That was practically the whole topic of the conversation between myself and Mr. Schuster at that time.

Q. You mean because if you got it all at once instead of spreading it over the years?

A. He informed me I could take it on a long term capital gain and wouldn't have to pay so much tax.

Q. Was anything mentioned about what would be sold—what was the subject matter of the sale?

Mr. Sadicoff: Just a minute. That is objected to upon the ground it is incompetent, irrelevant and immaterial and leading the witness.

The Court: I think that is permissible. It is merely to direct his attention to the topic. That should be answered yes or no and then it should

(Testimony of E. F. Smith)

be followed by another question unless you want to explain your answer.

The Witness: If I am permitted to answer this in my own way. I would say that yes or no wouldn't answer the question.

The Court: I know that, but the main point is this: If you answer yes, then Mr. Thomas will follow it up and ask you when the conversation took place and who was present and so forth. That is the point. I am not trying to hold you down to answering it yes or no. We are judges and not investigating committees, you see, and we have certain rules that we observe. The only object of asking you to answer yes or no is because if you answer yes he had to lay a foundation, as we call it; and if you answer no then the matter is at an end. So you will answer the question either yes or no and then Mr. Thomas will follow it up.

The Witness: Yes.

Mr. Thomas: Will you read the question? I have even forgotten it myself.

(Question read as follows: [66])

“Q. Was anything mentioned about what would be sold—what was the subject matter of the sale?”)

A. Yes, as I recall the conversation.

Q. (By Mr. Thomas): Just a minute. Your answer is yes? This happened where, did you say?

A. At the Hollywood race track.



(Testimony of E. F. Smith)

Q. Who was there present? I mean by that in your circle of conversation?

A. Mr. Schuster and myself.

Q. And about what date?

A. I will say some time the latter part of May. I am unable to say what date it was.

Q. What was said?

Mr. Sadicoff: That is objected to.

The Court: May of 1946?

The Witness: 1946, yes.

The Court: All right.

Mr. Sadicoff: That is objected to as incompetent, irrelevant and immaterial and not within any issue in this case, and because it is an attempt to vary the terms of the agreement that was finally consummated.

Here is a conversation that took place long before and which he says was finally worked out by his agent and not by him.

The Court: But where you seek to reform an instrument [67] the court has the right to go behind the instrument because otherwise there would be no occasion for seeking a reformation.

Of course, there is no claim of ambiguity in this case. It is claimed that a certain provision did not correctly represent the intention of the parties. In other words, a mutual mistake as I gather it. So, the rule which applies ordinarily to written instruments does not apply to this situation because this is one of the few situations where a person may go behind the instrument in order to show that the

(Testimony of E. F. Smith)

instrument did not express the true intention of the parties.

What effect is to be given to his testimony is a different proposition. That goes to the weight of it but not to the admissibility of it. Objection overruled.

The Witness: The conversation was very limited in regards to the markets. He just asked me what my thought would be in regard to exercising the option now instead of nine years later on. And I will say that he only referred to them either as the equipment or the markets. That is all that I will say the conversation was in regards to.

The Court: Was the lease referred to? You mean nine years was the balance of your lease?

The Witness: The balance of the lease at that time before the modified agreement. [68]

The Court: All right.

Q. (By Mr. Thomas): And the option he referred to was the one that at the end of the 10-year lease—

A. At the end of the 10-year lease, yes, sir.

The Court: As I gather it then, up to that time they merely had a sub-lease, is that true?

Mr. Thomas: That is correct.

Mr. Sadicoff: With the option to purchase at the end of ten years.

The Court: And this conversation relates to the changed agreement whereby they exercised the option sooner than provided in the original agreement, is that correct?

(Testimony of E. F. Smith)

Mr. Thomas: That is correct.

The Court: All right.

Q. (By Mr. Thomas): Did you thereafter and prior to the execution of the modified agreement talk to any one of these partners?

A. No, sir.

Q. Who conducted the negotiations for you?

A. Mr. Johnston.

Q. Did you at any time ever talk to any of the purchasers or their agents about the building situated on the Atlantic Market site?

A. I did not.

Q. In calculating the price which was negotiated between [69] you did you figure the value of the building?

Mr. Sadicoff: Objected to as incompetent, irrelevant and immaterial, and self-serving, and calling for a conclusion of the witness, and what was in his mind.

The Court: In view of the fact that price was not discussed by him, what he told his agent in regard to the price or the matter of calculation is not material unless the agent communicated that. Suppose the agent disobeyed his instructions and didn't communicate that. It is quite apparent that he did not carry on the negotiations. He merely was approached and then dealt through his agent. Therefore, any communication to the agent is not permissible unless you assure me that you intend to follow it up and show that he did so tell Mr. John-

(Testimony of E. F. Smith)

ston, and Mr. Johnston informed Mr. Schuster or somebody.

Mr. Thomas: I couldn't tell you that. I don't think I can bear that out.

The Court: You can't reform an instrument on an unexpressed thought in a man's mind.

Mr. Thomas: I didn't mean it in the sense that it is being approached and on the sense you are expressing it. I think you are absolutely right. The question is improper. I was trying to shortcut—find a shorter way to the subject matter.

The Court: And I like shortcuts as much as any judge. [70]

Mr. Thomas: The implications you are putting in I agree entirely with.

The Court: There are implications there, all right.

Q. (By Mr. Thomas): In your conversations with Mr. Schuster was the building mentioned?

A. No, sir.

Q. Did you at any time—I will withdraw that. Take the witness.

The Court: Let me ask one question, Mr. Sadi-coff, before you begin.

Could you tell us in your own words the substance of the conversation with Mr. Schuster? Did he use the word "option" or did he use the word "lease" when you say that he told you that he wanted to exercise the option? How did he express himself? Did he say, "I want to take up the option



(Testimony of E. F. Smith)

now,” or “I want to take the lease over now and pay you out,” or how did he put it?

The Witness: Your Honor, that is quite some time ago and it is hard for me to say exactly how he expressed himself.

The Court: I want the substance of it.

The Witness: The general substance and the meaning was that they would like the option called for \$192,500 at that time, and not continue to pay rent—only on the real property that I owned, and buy the equity at that time. That is what I gathered from his conversation. [71]

Mr. Sadicoff: I move to strike out what he gathered from the conversation unless he discloses—

The Court: You mean that is the substance of it?

The Witness: Yes, sir.

The Court: Well, was the word “option” used or did he say, “I want to take over the lease now.” What did he say?

The Witness: The lease was never mentioned. He either spoke of it as markets or the operation.

The Court: Markets or the operation? But the original agreement related—strike that. You had the leasehold on that particular market, didn’t you?

The Witness: I had a ground lease.

The Court: All right, go ahead.

#### Cross Examination

By Mr. Sadicoff:

Q. Mr. Smith, who was your lawyer?

A. Mr. Cassidy, Tom Cassidy at that time.

(Testimony of E. F. Smith)

Q. You had no conversations with anybody with respect to your leases or of the equipment other than with your agent and with Mr. Schuster at the race track in the summer of 1946, isn't that right?

A. That is right.

Mr. Sadicoff: That is all.

The Court: Any redirect?

Mr. Thomas: Maybe the other parties would like to [72] question him.

The Court: Mr. Menzies?

Mr. Menzies: No questions.

The Court: Mr. Davis?

Mr. Davis: I am not in the cross complaint; I don't know where I am.

The Court: You are not in at all.

Mr. Davis: I just can't find it.

Mr. Thomas: Mr. Johnston.

### JAMES R. JOHNSTON,

called as a witness by and on behalf of the Defendant Smith, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: James R. Johnston.

#### Direct Examination

By Mr. Thomas:

Q. What is your business?

A. Real estate broker.

Q. And were you a real estate broker in 1945 and 1946?      A. Yes, sir.

Q. Where are your offices located?

(Testimony of the James R. Johnston.)

A. 2620 South Avenue, Huntington Park.

Q. And at that time also? [73]

A. Yes, sir.

Q. At the times referred to in the instruments which you have heard referred to in the courtroom, in this trial, during all those times your office was at that address?

A. Yes, since July 1st, 1945, that has always been my office.

Q. You heard Mr. Smith's testimony that his agent, Mr. Johnston, conducted the negotiations. Are you that Mr. Johnston? A. Yes, sir.

Q. To whom did you first talk concerning the original agreement, and just to be sure I am taking this chronologically back at the first, Mr. Johnston, and not the second. Keep your mind on the first one. To whom did you first talk about the first agreement?

A. The agent for the Jim Dandy Markets. He approached me. Do you want me to go further?

Q. I am not asking for the conversation. I just want you to tell me what happened so that we will get our bearings on any conversations when they are proper to be given.

The Court: Fix the time so we may be certain that we are talking about the negotiations which preceded the making of the original sub-lease, and not the modification. Do you understand that?

The Witness: Yes. That would be in June of 1945 at [74] Mr.—the Jim Dandy Markets' agent first approached me relative to the purchase of those markets for Jim Dandy.

(Testimony of the James R. Johnston.)

Q. And did you then conduct negotiations as Mr. Smith's agent?

A. Well, I first got in touch with Mr. Smith, with whom I had been in touch for perhaps two or three weeks, and he told me he would consider selling them under certain conditions.

Q. And you proceeded to negotiate the transactions?      A. Yes, sir.

Q. Now, do you know the partners in the Jim Dandy Markets?      A. Yes, sir.

Q. Did you talk to any of them?

A. All of them, I believe.

Q. At different times?      A. That is right.

Q. About the negotiations?

A. That is right.

Q. At any time during any of these conversations did you talk about the building situated on the Atlantic Market site?

A. The only time that the buildings were mentioned was in Judge Cassidy's office. That is prior to the fire, if I can put it that way. [75]

Q. Well, we are talking about prior to the first agreement, prior to July 1, 1945.

A. Yes. They were the original leases on the Atlantic and all of the other markets. They were produced in Judge Cassidy's office when the co-partners met there to discuss the drawing of this agreement.

Q. Who were present at that time?

A. I believe all of the co-partners, Mr. Russell, Judge Cassidy and myself.



(Testimony of the James R. Johnston.)

Mr. Sadicoff: Pardon me, Mr. Thomas. As I understand, that was in June of 1945?

Mr. Thomas: That is right. That is my understanding.

The Witness: That is right.

Q. (By Mr. Thomas): You say there was some conversation relative to buildings?

A. Well, only this, that all of the leases were produced so that the co-partners could examine them and the leases mentioned on the Atlantic and other markets, Ontario, that they were on leased ground and that the buildings were put on by the lessee and could be removed by him.

Q. Who mentioned that?

A. I am not sure who first mentioned it, but Mr. Goldberg and Mr. Swetow discussed the matter, that they were Mr. Smith's buildings; that he had built them on the leased ground. [76]

Q. Was that discussed with all the parties in on that conversation? Was that where everybody was listening to somebody else? A. I suppose so.

Q. Did you have any conversation relative to the buildings at that time?

A. None other than the fact that they were built on leased ground.

Q. Did you at any other time, and now again confining ourselves to the agreement of July 1, 1945, and prior to that or at the time of its execution, have any further or other conversation with any of the parties or their agents relative to the buildings on these grounds? A. No, sir.

(Testimony of the James R. Johnston.)

Q. Did your negotiations include negotiations of price?      A. Oh, yes.

Q. Who did you discuss about price with?

A. Well, I talked to Mr. Russell first, who was

Q. No, I am talking about the Jim Dandy people.

A. Well, I talked to Mr. Russell first, who was their agent, and speaking now of the first agreement—

Q. That is all?

A. There wasn't any contention over price. If I can explain it this way? Mr. Smith had been negotiating with another party and he established with them a price of \$200,000, [77] which price he was willing to sell at to Mr. Russell's client and that information I gave to them.

Q. And it was on the basis of that price that the agreement was closed?

A. That is right, the price of \$192,500 is the same price, because they paid \$7,500 for trucks and so on in cash.

Q. In other words, there was just a change in the method of payment ending up in that price?

A. That is right.

Q. During that negotiation or conference was there any discussion between you, by you with any of the Jim Dandy Market partners or their agents, relative to the price including the building?

A. No, sir.

Q. Now, did you have any discussion with any of the partners—I will withdraw that. When, after

(Testimony of the James R. Johnston.)

the closing of the agreement dated July 1, 1945, did you next talk to any of the Jim Dandy Market partners or their agents concerning this same set of markets?

A. Now, if you mean by the "closing of the agreement," you mean when the escrow was closed and everything all through?

Q. No, I asked you subsequent to the completion of the first agreement—I understand your testimony and there is [78] evidence the first agreement was July 1, 1945? A. That is right.

Q. The first agreement, the one dated July 1, 1945, was all completed and signed and they went into possession under it. I think that is all in evidence from the documents and stipulations.

A. That is true.

Q. Now then, following that, when did you next have a conversation with any of the Jim Dandy partners or their agents relative to that group of markets?

A. Well, following the execution of that first agreement we still had to go through escrow and there were certain things in connection with the papers which were required in the escrow that necessitated me seeing both Mr. Russell and some of the co-partners.

Q. All of which was consummating the first agreement? A. That is right.

Q. And did any of those conversations have anything to do with the subject matter of the sale or lease? A. (No answer.)

(Testimony of the James R. Johnston.)

Q. Or was it purely a matter of consummating the things that were agreed to be done?

A. Yes; that was purely following out the things necessary to complete the transaction agreed upon.

The Court: In other words, the terms were no longer [79] discussed?

The Witness: That is right.

The Court: They had been agreed upon before?

The Witness: That is right.

Q. (By Mr. Thomas): What I am trying to direct to your attention is that subsequent to the completion of the first one and their possession when did you next have a conversation?

The Court: I will let you ask the witness a leading question whether Mr. Sadicoff objects or not. Let me ask the question.

Mr. Sadicoff: To what point is that giving me the right to object if your Honor already overrules my objection?

The Court: I will listen to your objection after the question is put. After it was completed in escrow, the original agreement, did you have any further conversations?

The Witness: Not for almost a year.

The Court: Tell us that year and let us start from there. Tell us what, if any, conversations you had either with the partners or their representatives?

The Witness: Well, Mr. Russell—

The Court: First the date.



(Testimony of the James R. Johnston.)

The Witness: Mr. Russell approached me in May of 1946 telling me that Mr. Schuster—

Mr. Thomas: I didn't hear the beginning of that.

The Court: He said Mr. Russell approached him in May of 1946.

The Witness: Telling me that Mr. Schuster had talked to Mr. Smith relative to executing his option at that time rather than nine years in the future, and that Mr. Smith would listen to it, but we would have to work out some sort of deal on it. That started the new negotiations that led to the modified agreement.

Q. By Mr. Thomas: Now, who did you next talk to after that? Were you at that time acting as Mr. Smith's agent when Mr. Russell approached you?

A. Well, that was merely a presumption at that time because I had been Mr. Smith's agent for a great many years. I hadn't yet contacted Mr. Smith.

The Court: But you communicated that to Mr. Smith?

The Witness: Yes, sir.

The Court: To whom?

The Witness: Mr. Smith.

The Court: After that what did you tell Mr. Smith?

The Witness: Mr. Smith told me at that time he wouldn't consider exercising the option at the price of \$192,500 for several reasons of his own, but he would consider it at a higher figure, but he

(Testimony of the James R. Johnston.)

wouldn't pay me the commission for handling the deal nor he didn't want me to again hire the attorney for him; that their attorney could prepare the papers [81] and they would have to pay whatever commissions were involved. Other than that he would consider selling at a price.

The Court: All right.

The Witness: The price that he gave first to me I believe was \$235,000, and in the negotiations he finally agreed upon \$225,000.

The Court: All right.

Q. By Mr. Thomas: Now, in your conversations with Mr. Russell or with any of the partners leading up to or looking to the settlement of that price, or the making of the supplemental agreement, was the building on the Atlantic Market site ever mentioned?

Mr. Sadicoff: Just a minute. I submit the proper foundation should be laid because we don't know yet whether the conversation was with Russell or the partners and I think we are entitled to know.

The Court: Let me ask you this question.

Mr. Thomas: Yes, your Honor.

The Court: I will put it this way. I think the question should be split.

Mr. Thomas: I will split it.

The Court: Ask him what if any conversation he had, or did you have any conversation with Russell, and if he says yes, then ask him if he had a conversation with anyone else relating to the same

(Testimony of the James R. Johnston.)

topic. I think that would overcome the [82] objection. It is a multiple question and the answers may not be very revealing.

Q. By Mr. Thomas: Did you during any times in the negotiation for the supplemental agreement have any conversation with Mr. Russell relative to the building on the Atlantic Market site?

A. No, sir.

Q. Did you have a conversation relative to that building with any one of the partners?

A. No, sir.

Mr. Menzies: May I have the answer?

The Witness: No, sir.

Q. By Mr. Thomas: Did you have a conversation relative to that building with anybody else that was an agent for the partnership?

A. No, I did not.

Mr. Thomas: That is all.

Mr. Sadicoff: That is all, Mr. Johnston.

Mr. Menzies: No questions.

Mr. Thomas: If your Honor please, I arranged with Judge Cassidy, the lawyer at Huntington Park, who is pretty elderly now, to come here. He said he would come when I called him. I called him at noon when I saw how we are expediting this matter and he begged off until somebody could bring him in in the morning.

I don't know that it is essential, but with that reservation that is all the testimony I have.

The Court: Maybe counsel will stipulate what he will testify to. It is already in evidence that

Mr. Cassidy was evidently recommended for employment by Mr. Johnston.

Mr. Thomas: He was attorney, but Mr. Sadicoff and I couldn't agree in reference to a stipulation a while ago, and whether we can after the testimony is in I don't know.

The Court: The thing you could not agree upon was whether he actually prepared the documents?

Mr. Thomas: He did and they were put out on his paper. This is the question that I think he should answer and that is whether he drew them with an understanding of the significance of this building or the place of the building and if it was in the picture.

The Court: Well, his understanding is not material. It is the understanding of Mr. Smith.

Mr. Thomas: He is the one who drew the documents and if he had understood something on any false premise, my theory if he had misunderstood any of the things in which he was drawing that was the reason I thought it was proper to bring him here.

The Court: Suppose I declare a short recess and you talk with Mr. Sadicoff and see if he will stipulate as to what he would testify to? Frankly, gentlemen, I work rather [84] long hours and I am anxious to close the testimony and I wouldn't like to keep the case open for that purpose. In addition to that, Mr. Sadicoff and Mr. Davis, well, not Mr. Davis, but Mr. Sadicoff should have an opportunity in the light of all your testimony to present a mo-



tion to dismiss. I have already indicated that I wouldn't grant it. But he should be able to put his motion on record and he can't do that until you actually rest, so I will declare a recess and you gentlemen see if you can stipulate as to what Mr. Cassidy would testify if called as a witness and then we will save him the trouble of coming here if it isn't necessary. Mr. Sadicoff may be willing to agree that if he were called he would testify along a certain line.

If Mr. Sadicoff feels he cannot do it, then I will govern myself accordingly and we will do something else.

Mr. Sadicoff: Counsel knows I am in most cases, very cooperative.

The Court: Well, you gentlemen can get together. Incidentally, I find this case has been kind of mixed up on the record. I sent a note to Judge Hall asking him to transfer it here and he said that he had already transferred it out of his department to the clerk for re-assignment, and that the clerk re-assigned it to Judge Harrison. We have to check the minutes to see who is going to sign. I am senior judge now and I am also the trial judge. It may be [85] that I will have to sign in three places.

Mr. Davis: A question of jurisdiction or venue.

The Court: Because Judge Harrison is ill at home and we have to see what minute order was made and how this happens to be wandering

around and landed in my court without any record at all of an assignment.

Mr. Menzies: May I inquire what time you are going to adjourn?

The Court: I will run until five o'clock.

Mr. Menzies: You won't run later than that? I have to make some arrangements.

The Court: I have been going later than that every night this week, but I won't do it tonight.

(Short recess.)

The Court: You may proceed.

Mr. Thomas: Judge Cassidy is here now, your Honor.

The Court: Very well.

### THOMAS V. CASSIDY,

called as a witness by and on behalf of the Defendant Smith, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness. Thomas V. Cassidy.

#### Direct Examination

By Mr. Thomas:

Q. Mr. Cassidy, you are an attorney at law, are you not? [86]      A. Yes, sir.

Q. Practicing in Huntington Park?

A. Yes, sir.

Q. Do you know Mr. E. F. Smith, the defendant in this action?      A. I do.

Q. One of them?      A. Yes.

Q. You were his attorney in 1945 and 1946 and on various jobs?      A. Yes, I was.

(Testimony of Thomas V. Cassidy)

Q. Now, this suit concerns an agreement between Jim Dandy Markets and Mr. Smith, the original of which was drawn in July, July 1st, 1945. Do you remember the transaction?

A. I do.

Q. And do you remember drawing the agreement?

A. Yes, I remember it.

Q. And then about a year later, in June, 1946, not quite a year later, there was a supplemental and modified agreement drawn?

A. Yes, sir.

Q. And in both instances you acted as Mr. Smith's attorney for the preparation of the documents involved in those transactions?

A. I don't recall right now about the supplemental [87] agreements. If you are talking about the same things I am—

Q. You remember about the original agreement drawn July 1st.

The Court: Show him a copy of the document and he will probably remember when he sees the exhibit.

Mr. Thomas: It is in the pleadings and is Exhibit 13.

Mr. Sadicoff: The agreement of July 1945.

The Court: This is not on your original paper, Mr. Cassidy. This is a copy which is attached to Mr. Smith's answer. By looking at it you will

(Testimony of Thomas V. Cassidy)  
probably recollect it. This is dated July 1st, 1945,  
and is Exhibit 13.

The Witness: Yes, I recall this.

Q. By Mr. Thomas: Now, Plaintiffs' Exhibit 6, which is "B" in the Jim Dandy answer, your Honor, and I will change it—that is Plaintiffs' Exhibit 7.

The Court: This is a photostat, Mr. Cassidy. It is called "Supplementary and Modified Agreement", dated June 12th, 1946. It has seven pages.

The Witness: I recall this now.

Q. By Mr. Thomas: You recall it?

A. Yes.

Q. Now, in Exhibit No. 10—

Mr. Menzies: That is "F" in the answer.

The Witness: Here is 10. [88]

The Court: Go ahead.

Q. By Mr. Thomas: Now, do you remember those documents?

A. Yes, I do.

Q. And there was also some others but those are the ones that I think will identify the subject matter here. Do you remember the drawing of that assignment of the lease, Defendants' Exhibit 10, and did you have any conferences with any of the Jim Dandy partners or their agents in regard to it?

A. I do not recall any conferences with Jim Dandy on this.

The Court: Did you with Mr. Russell? If we



(Testimony of Thomas V. Cassidy)

give you a name could you remember it? Did you ever see Mr. Russell, their agent?

The Witness: Most of these, if the court please, were drawn at the suggestion and request of Mr. Smith's agent.

The Court: Mr. Smith's agent?

The Witness: Yes, Mr. Johnston.

Q. By Mr. Thomas: Do you know Mr. Schuster, or Mr. Goldberg?

A. I wouldn't know them. I know who they are.

Q. Mr. Earl Swetow?

Q. Yes, I know Mr. Swetow.

Q. Did you ever talk to him about it?

A. I don't know whether we discussed this, but I talked [89] to Mr. Swetow about the agreements, but this particular one I don't have no independent recollection.

Q. Did you with the general group?

A. Yes, sir.

Q. Did you ever talk to Mr. Swetow about the building situated on the Atlantic Market site?

A. No, I did not.

Q. Did you ever talk to Mr. Charles Schuster or Mr. Leo A. Goldberg or Mr. Berick or Mr. Norman Schuster about the building situated on Atlantic Boulevard?

A. No, I did not.

Q. Did you in drawing this give any consideration or have any knowledge of any dealing with that building?

(Testimony of Thomas V. Cassidy)

A. No.

Mr. Sadicoff: That is objected to as calling for a conclusion of the witness and is incompetent, irrelevant and immaterial—any undisclosed intention that he had.

The Court: I will sustain the objection but you may ask him what instructions he received from Mr. Johnston in regard to the building. I will sustain the objection. He already stated he had no direct word about the building.

Q. By Mr. Thomas: What instructions did you have from anyone concerning the treatment of the building on the Atlantic Market site?

The Court: Before drawing this instrument, Exhibit 10? [90]

The Witness: None. There was no instructions of any kind. The buildings were never mentioned in my presence.

The Court: What were you told when you were told to prepare this assignment?

The Witness: The assignment that they were to assign the property referred to in the inventory in the lease.

The Court: The interest in the lease?

The Witness: Yes, it was referring to certain fixtures and equipment.

The Court: But this contract refers to the interest in the leasehold. This assigns the leasehold. This exhibit is entitled "Assignment of Lease," and refers by virtue of: "\* \* \* of the covenants and

(Testimony of Thomas V. Cassidy)

agreements set forth in a certain agreement dated July 1, 1945, and supplementary and modified agreement, dated June 12th, 1946, do hereby sell, assign, transfer and set over unto Charles Schuster, Leo A. Goldberg, Earl A. Swetow, Max M. Berick and Norman Schuster, a certain indenture and lease dated February 1, 1942, by and between Thomas A. McLenaghan, as administrator of the estate of E. T. Williams, deceased, and the undersigned, wherein certain land and buildings therein described were demised to the undersigned for a period of five years from August 1, 1942, to August 7, 1947, at the rental therein stated, together with any renewal or extension of said leases which may be secured by the undersigned, subject to the rents, covenants, [91] and conditions contained in said leases, and herein referred to as Atlantic Store—it being understood, however, that this assignment shall not become effective until the assignee herein has complied with all of the terms and conditions in any way affecting the property hereby leased \* \* \*."

Now, what if any instructions did you receive from Mr. Johnston in regard to that?

The Witness: Well, the only instructions that I received from Mr. Johnston were to prepare an assignment for the lease.

Q. By Mr. Thomas: Did you have any instructions—I will withdraw that.

The evidence already in, Judge, and the agreements refer to four assignments and four units on

(Testimony of Thomas V. Cassidy)

which leases were to be made. Do you remember that there were eight units altogether involved?

A. There were several units as I recall it, that the property was owned outright by Smith and the others he had leases on them, if my memory serves me correctly.

Q. Did you have any instructions from anyone relative to the different statuses of the leased property, relative to the building situated on the leased property?

A. None whatever.

Q. And you drew them all in the same manner as an ordinary assignment? [92]

A. As I recall it, yes.

Q. Did you draw these up originally yourself or were they submitted and revised and re-considered by you?

A. Oh, the original lease—that was drawn by—there was amendments to it and it was incorporated in the original lease by Mr.—I think it was Mr. Swetow of the Jim Dandy. It wasn't drawn at once. There were several changes made in it.

Q. And as to the assignments is that also true?

A. I don't recall him having anything to say about the assignments.

Q. You wrote them up yourself?

A. As I remember it, Mr. Johnston and myself.

The Court: Did I understand you to say you didn't talk to Mr. Smith about this at all?



(Testimony of Thomas V. Cassidy)

The Witness; No.

Mr. Thomas: That is all.

Cross Examination

By Mr. Sadicoff:

Q. Judge Cassidy, how long have you been practicing law? A. (No answer.)

Q. Would you care to tell us?

A. Yes, if I can think back—1911.

Q. In Los Angeles County? [93]

A. All in Los Angeles County.

The Court: I am three years his senior. I have been practicing since 1909.

Mr. Sadicoff: I had better get off the subject of age. That is all, Mr. Cassidy.

Mr. Menzies: Just a minute, Judge.

Q. By Mr. Menzies: When you discussed the original document of July, 1945, with Mr. Johnston, did you also discuss it with Mr. Russell?

A. There was a meeting in my office where Mr. Russell was present together with members of the Jim Dandy group.

Q. And Mr. Johnston?

The Court: Let him finish.

The Witness: Mr. Johnston was there.

Q. By Mr. Menzies: Have you finished, Judge?

A. Yes.

Q. Now, at that time was there any discussion had between any of the parties as to whether or not the buildings that were situated on the Atlantic Market site went over to Jim Dandy or did they remain the property of Mr. Smith?

(Testimony of Thomas V. Cassidy)

Mr. Sadicoff: That is objected to as calling for a conclusion of the witness and is irrelevant, incompetent and immaterial, and does not bear upon any of the issues in this case as to what happened in the original agreement of July 1945. [94]

The Court: The objection is sustained. There is no contention the original agreement needs reforming.

Mr. Menzies: Very well, your Honor. I think that is correct.

Q. By Mr. Menzies: Now, Judge Cassidy, at the time that you drew this supplemental agreement did you discuss the facts and circumstances surrounding that transaction with Mr. Johnston and Mr. Russell?

A. I don't recall Mr. Russell. I discussed it with Mr. Johnston.

Q. Did you discuss it with any of the partners of the Jim Dandy Markets?

A. I doubt if we did in the supplementary agreement.

Q. At the time that you talked to Mr. Johnston about this supplementary agreement was there anything said with relation to the title of the building of the Jim Dandy Market?

Mr. Sadicoff: That is objected to on the ground it is hearsay and not binding upon us.

The Court: Read the question.

(Question read.)

The Court: I will overrule the objection.

(Testimony of Thomas V. Cassidy)

The Witness: No, sir.

Mr. Menzies: That is all, thank you.

Mr. Thomas: I would like to recall Mr. Smith for a couple of questions. [95]

Mr. Menzies: Let me ask one question more of Judge Cassidy.

Q. By Mr. Menzies: Judge Cassidy, did you know whether or not the building went—whether the lease provided for the building going over to Jim Dandy Markets or whether it remained with Mr. Smith?

Mr. Sadicoff: That is objected to as incompetent, irrelevant and immaterial.

The Court: I will sustain the objection.

Mr. Sadicoff: The documents speak for themselves.

The Court: It is not material.

### E. F. SMITH

called as a witness by and on his own behalf, having been previously duly sworn, resumed the stand and testified further as follows:

#### Further Direct Examination

By Mr. Thomas:

Q. Mr. Smith, the assignment of lease, Plaintiffs' Exhibit 10, relative to signing the leases for the Atlantic Market, was signed by you and it was executed and it has been stipulated and it has gone in evidence as that. Now, did you understand at the time you executed that—did you have any

(Testimony of E. F. Smith.)

knowledge or suspicion that that assignment would carry with it the building on the Atlantic Market site?

Mr. Sadicoff: Objected to as incompetent, irrelevant and [96] immaterial, and not within any issues in this case. Withdraw that incompetent, irrelevant and immaterial. The instruments speak for themselves.

Mr. Thomas: It is the whole issue. If there was a meeting of minds and they knew what they were doing there wouldn't be any mistake.

The Court: Of course it might be a mutual mistake.

Mr. Thomas: But I can't prove but one thing at a time.

The Court: I will reserve a motion to strike. I will allow the witness to answer the question.

The Witness: I did not; no, sir. I at no time thought of the building being in the transaction at all.

The Court: Then why did you ask for additional consideration—originally \$45,000, and then \$35,000, for the exercise of the option.

The Witness: When I made the original agreement I figured this equipment would be well worn out in a matter of ten years, and if they bought it at this time and I sold it at this time I figured the equipment had a lot more worth to it and I wouldn't receive that rent for the additional nine years, and I was in no mind to sell, but I figured if they would



(Testimony of E. F. Smith.)

give me the additional money that I asked that I would go ahead and sell.

The Court: But if they exercised the option at the end of ten years the fixtures would merely be second-hand fixtures [97] and how could you be harmed if you exercised it in advance?

The Witness: I wouldn't have received the rent that I would have received during the additional nine years.

The Court: All right.

Mr. Thomas: That is all.

Mr. Sadicoff: That is all.

Mr. Thomas: That is all, your Honor, for the cross complainant.

The Court: Any further witnesses on your part?

Mr. Thomas: No, that is all.

The Court: You rest?

Mr. Thomas: I rest on the cross claim, yes.

The Court: Any testimony desired to be presented?

Mr. Sadicoff: Futile as it may be in view of your Honor's—

The Court: Let us strike out the word "futile."

Mr. Sadicoff: In view of what your Honor stated, I move for a dismissal of the cross claim of the defendant E. F. Smith, upon the ground that there is no evidence adduced which would justify the court in rendering a judgment in favor of Mr. Smith on his cross claim.

The Court: The motion will be denied. I think the matter presents a question of law which can

be better determined when all the evidence is in the record. [98]

You may call any other witnesses you desire.

Mr. Sadicoff: The defendant Jim Dandy Market rests.

The Court: All right. Is there any rebuttal?

Mr. Menzies: I take it the defendant Fireman's Fund is not going to introduce any evidence?

The Court: No, no.

Mr. Menzies: There is no rebuttal then.

May I ask Mr. Davis this, although he be the backseat driver and is resting on his rights, whether or not there is any dispute as to the fact that the Fireman's Fund received a proof of loss within the time prescribed in the policy and no objection was taken, or whether there was an objection to it.

Mr. Davis: Well, I stand on my Constitutional rights and in the most polite words I know I will say it is none of your business. There is no issue been brought against us and I am not called upon to answer.

The Court: What answer did you put in, Mr. Davis?

Mr. Davis: I put in an answer.

The Court: As I gather it he is asking for a declaration as to whether he is entitled to an apportionment of the loss clause.

Mr. Davis: That is a question of law, your Honor.

The Court: I just wanted to find out as to the factual situation. Of course I am not going to tell

you to put [99] anything in if you don't want to, but I wanted to see what declaration he has against you.

Mr. Davis: He has none against me other than as it affects the Jim Dandy Market.

The Court: You don't want to stipulate as to whether they have made proof of loss?

Mr. Davis: I will make no issue on it, your Honor. I think it is immaterial. I think it is already stipulated to, anyway.

Mr. Sadicoff: Stipulated in Exhibit A in the pre-trial hearing that we had before Judge Hall. It was stipulated that the defendant Smith had done everything required of him to be done under the terms of the policy with the Fireman's Fund.

The Court: Does that apply to the policy of the Fireman's Fund?

Mr. Sadicoff: Yes.

Mr. Davis: I stipulated with the same reservations I am making here. I said for their purpose only I would so stipulate.

Mr. Menzies: I take it you are not introducing any evidence at this time.

Mr. Davis: There is no issue I have to meet.

Mr. Menzies: All parties rest, your Honor.

(Argument which followed was reported but not transcribed.) [100]

(Whereupon, the above entitled matter was concluded.) [101]

## CERTIFICATE

I do hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 22nd day of June, A.D. 1948.

/s/ J. D. AMBROSE,  
Official Reporter.

[Endorsed]: Filed Jun. 25, 1948.

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[Endorsed]: No. 11982. United States Court of Appeals for the Ninth Circuit. E. F. Smith, Appellant, vs. Jim Dandy Markets, Inc., Fireman's Fund Insurance Company, Central Manufacturers' Mutual Insurance Company, and Indiana Lumbermen's Mutual Insurance Company, Appellees, and Central Manufacturers' Mutual Insurance Company, and Indiana Lumbermens Mutual Insurance Company, Appellants, vs. Jim Dandy Markets, Inc., Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed July 19, 1948.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for  
the Ninth Circuit.



United States Court of Appeals for the Ninth  
Circuit

No. 11982

E. F. SMITH,

Appellant,

vs.

JIM DANDY MARKETS, INC., et al.,

Appellees.

APPELLANT SMITH'S STATEMENT OF  
POINTS ON WHICH HE INTENDS TO  
RELY ON THE APPEAL AND DESIGNA-  
TION OF RECORD

Appellant E. F. Smith, pursuant to Rule 19 (6) of the Rules Circuit Court of Appeals, 9th Circuit, makes the following statement of the points on which he intends to rely on the appeal:

1. The judgment is contrary to the law and the evidence: (a) In adjudicating that defendant Jim Dandy Markets, Inc., was the sole unconditional owner of the building known as the Atlantic Store and;

(b) In adjudicating that the assignment of lease dated June 27, 1946 conveyed to the predecessors in interest of defendant Jim Dandy Markets, Inc., all right, title, and interest of defendant E. F. Smith to the building destroyed by fire;

(c) In adjudicating that there is no showing of mutual mistake or any mistake in the execution of said assignment;

(d) In adjudicating that the defendant Fireman's Fund Insurance Company is entitled to go hence.

2. That part of Finding of Fact XII that at the time the building known as the Atlantic Store was destroyed by fire on January 14, 1947, the defendant Jim Dandy Markets, Inc., was the sole and unconditional owner of said building, is contrary to the evidence.

3. That part of Finding XVI that on June 27, 1946 defendant E. F. Smith sold, assigned and transferred to the predecessors in interest of the defendant Jim Dandy Markets, Inc., all of his right, title and interest in said building and that at no time subsequent thereto did said E. F. Smith have any interest in said building other than a lien for the payment of the purchase price thereof, is contrary to the evidence.

4. That part of Finding of Fact XVII that in accordance with the agreement entered into between the defendant E. F. Smith and the predecessors of the defendant Jim Dandy Markets, Inc., on June 27, 1946 and by the terms thereof and by the assignment of lease found by the Court, the defendant E. F. Smith sold, assigned, and transferred to the predecessors of the defendant Jim Dandy Markets, Inc., all right, title and interest in and to the building referred to in the findings, is contrary to the evidence.

5. That part of Finding XVII that there was no other or different agreement between said parties than as evidenced by said written assignment and the said written assignment embodied the entire

agreement between the parties thereto, is contrary to the evidence.

6. That part of Finding XVII that the written agreement, consisting of exhibits "7", "8", "9", and "10", constituted the entire agreement between said parties, and that said agreement correctly expressed the intention of the parties thereto and that there was no mistake either mutually or otherwise in the drafting of said assignment, which intended to and was effective in conveying from the defendant E. F. Smith to the predecessors in interest of the defendant Jim Dandy Markets, Inc., all the right, title and interest of said defendant E. F. Smith in and to said building, is contrary to the evidence.

7. That part of Finding XIX that it was not true that during the negotiations and the discussions between the defendant E. F. Smith and the predecessors in interest of the defendant Jim Dandy Markets, Inc., or their brokers or agents, the building was not considered as a subject of the proposed sale, is contrary to the evidence.

8. That part of Finding XIX that it is not true that the value of said building was in no wise considered as an element of the sales price agreed upon, is contrary to the evidence.

9. That part of Finding XIX that it is not true that said assignment found by the Court does not correctly contain the agreements between the defendant E. F. Smith and the predecessors in interest

of the defendant Jim Dandy Markets, Inc., is contrary to the evidence.

10. That part of Finding XIX that it is not true that defendant E. F. Smith did not intend to convey said building to the predecessors in interest of the defendants Jim Dandy Markets, Inc., and that defendant E. F. Smith did intend to convey said building by said assignment to the predecessors in interest of the defendant Jim Dandy Markets, Inc., is contrary to the evidence.

11. That part of Finding XIX that defendant E. F. Smith, at the time he executed the assignment found by the Court, intended to convey and did convey to the predecessors in interest of the defendant Jim Dandy Markets, Inc., all of his right, title and interest to said building, is contrary to the evidence.

12. That part of Finding XX that it is true that at the time said building was destroyed by fire on January 14, 1947 Jim Dandy Markets, Inc., was the sole and unconditional owner of the leasehold previously owned by defendant E. F. Smith, including the right to the building on said premises, is contrary to the evidence.

13. That part of Finding XX that it is not true that said assignment found by the Court was executed by the defendant E. F. Smith under the mistaken belief that the building destroyed by fire was not conveyed by said assignment and it is not true that said assignment does not truly express the in-



tention of the parties to said assignment and on the contrary that said assignment does truly express the intention of the parties thereto, is contrary to the evidence.

14. The evidence, without contradiction or denial is that:

(a) Smith owned the subject building and the predecessors of Jim Dandy Markets, Inc., were his tenants as sublessees under the original agreement;

(b) At the time of the fire such relation was still in effect by the terms of the modified agreement;

(c) The subject building was worth \$32,476.92 and another building had the same status but the modified agreement did not add one cent to the purchase price as compensation for these buildings:

(d) The building was at no time mentioned by Smith or any of his agents during the negotiations and they at no time considered the building as a subject of the sale.

(e) The predecessors of Jim Dandy Markets, Inc., considered the building a subject of the sale and the deduction is inescapable that they knew that Smith did not so consider it.

15. The assignment on which Jim Dandy Markets, Inc., relies as conveying title is a document which was executed in compliance and consummation of the agreement as modified and the intention of the parties is to be determined from the original and modified agreements and not from some technical but unspecified meaning which is read into it.

## DESIGNATION OF RECORD

Appellant E. F. Smith hereby designates the parts of the record which he thinks necessary for the consideration of his points on appeal as all of the record except plaintiff's exhibits No. 2, No. 3, and No. 4, which exhibits were transmitted to the Appellate Court and were not copied by the Clerk of the Trial Court and need not be printed for the consideration of the foregoing points.

CLYDE THOMAS and  
MILAN MEDIGOVICH,

By /s/ CLYDE THOMAS,

Attorneys for Appellant E. F. Smith.

(Acknowledgment of Service attached.)

[Endorsed]: Filed July 27, 1948. Paul P. O'Brien, Clerk.

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[Title of Court of Appeals and Cause.]

## STIPULATION

Subject to the order of the Court, it is hereby stipulated that the following named exhibits need not be printed in the record but may be referred to and considered in their original form, to wit:

Plaintiff's Ex. No. 2, Central Manufacturer's Insurance Policy.

Plaintiff's Ex. No. 3, Indiana Lumbermans Insurance Policy.

Plaintiff's Ex. No. 4, Fireman's Fund Insurance Policy.

Said exhibits were transferred to the Appellate

Court by order of the trial court and were not reproduced by the Clerk of the Trial Court.

The reason for this stipulation to not reproduce said exhibits is that reference will be made to only very short portions of said policies readily printable in the briefs; that said policies are exceedingly long, many paragraphs are duplicatures, and the printing thereof would be excessively costly with no compensating advantage in the consideration of the case.

Dated: July 22, 1948.

CLYDE THOMAS and  
MILAN MEDIGOVICH,

By /s/ CLYDE THOMAS,

Attorneys for Appellant E. F. Smith.

THOMAS P. MENZIES and  
HAROLD L. WATT,

By /s/ HAROLD L. WATT,

Attorneys for Appellees Central Manufacturers'  
Mutual Insurance Co. and Indiana Lumbermans  
Mutual Insurance Company.

HARRY G. SADICOFF,

By /s/ EDWARD I. HARRIS,

Attorney for Appellee Jim Dandy Markets, Inc.

HINDMAN & DAVIS and  
E. EUGENE DAVIS,

By /s/ E. EUGENE DAVIS,

Attorneys for Fireman's Fund Insurance Company.

It is so ordered:

/s/ FRANCIS A. GARRECHT,

Senior U. S. Circuit Judge.

[Endorsed]: Filed July 26, 1948. Paul P.  
O'Brien, Clerk.

